(17,386.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 277.

LOUISA BANHOLZER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF Minnesota

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Louisa Banholzer, plaintiff, and The New York Life Insurance Company, a corporation, defendant, wherein was drawn in question the construction of a clause of the Constitution and a statute of the United States and the decision was against the title, right, privilege, and immunity specially set up or claimed under such clause of the Constitution and statute, a manifest error hath happened, to the great damage of the said Louisa Banholzer, as by her complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be
2 done therein to correct therein what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court, the 11th day of April, in the year of our Lord eighteen hundred and ninety-nine.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States
for the District of Minnesota.

Allowed by—
CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

3 [Endorsed:] In the Supreme Court of the United States. Louisa Banholzer, plaintiff in error, against The New York Life Insurance Company, a corporation, defendant in error. Writ of error to the supreme court of the State of Minnesota. Christopher Dillon O'Brien, attorney.

4 UNITED STATES OF AMERICA, *ss:*

To the New York Life Insurance Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the 10th day of May, A. D. 1899, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Louisa Banholzer is plaintiff and you defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 11th day of April, in the year of our Lord eighteen hundred and ninety-nine.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

5 [Endorsed:] 11366. In the Supreme Court of the United States. Louisa Banholzer, plaintiff in error, against New York Life Insurance Company, a corporation, defendant in error. Citation. Due and legal service of the within citation is hereby admitted by receipt of true and correct copy thereof personally at St. Paul, Minnesota, this 11th day of April, A. D. 1899. Flandrau, Squires & Cutcheon, attorneys for defendant in error. Christopher Dillon O'Brien, attorney for plaintiff in error.

Endorsed: Filed Apr. 20, 1899. Darius F. Reese, clerk.

6 To the honorable the chief justice of the supreme court of the State of Minnesota:

And now comes Louisa Banholzer, of the city of Saint Paul, in the county of Ramsey, in the State of Minnesota, by Christopher Dillon O'Brien, her attorney, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between her, plaintiff, and The New York Life Insurance Company, a corporation, defendant, in said supreme court of the State of Minnesota, being the highest court of law or equity of the said State in which a decision could be had in said suit and in which final judgment was rendered against her on the 10th day of April, eighteen hundred and ninety-nine, in said suit, wherein was drawn in question the construction of a clause of the Constitution and a statute of the United States and the decision was against the title, right, privilege, and immunity specially set up or claimed by her under such clause of the Constitution and statute, all which appears in the record and proceedings in said suit, a manifest error hath happened to the great damage of the said Louisa Banholzer.

Wherefore she prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

CHRISTOPHER DILLON O'BRIEN, *Attorney.*

Endorsed: 11366. Filed Apr. 20, 1899. Darius F. Reese, clerk.

7 In the Supreme Court of the United States.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, a Corporation, Defendant. } In Error.

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Louisa Banholzer, plaintiff in error, by Christopher Dillon O'Brien, her attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Whereas in her complaint she set out a certain statute of the State of New York (being Session Laws of 1892, chapter 690, section 92), which was admitted by the defendant to be a duly enacted and genuine public act of said State, and duly and properly approved and promulgated, and at all times mentioned in her said complaint existing in full and uninterrupted force and efficacy as such public act and the law of said State, and which is as follows, to wit:

"SECTION 92. Non-forfeiture of policy without notice.—No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest or installment or portion thereof due on such policy,

8 the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the rights of a surrender-value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made in the time limited therefor, it shall be taken to be in full compliance of the requirements of the policy in respect to the time of payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the making of such notice. The affidavit of any officer, clerk or agent of the cor-

poration or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing the policy, shall be presumptive evidence that such notice has been duly given."

And whereas plaintiff in error in the lower court did specially set up and claim that by virtue of the force and effect secured in the State of Minnesota to the said public act and its operation by section one (1) of article four (IV) of the Constitution and section 905, Revised Statutes of the United States, under the facts disclosed by the record, no forfeiture of the life-insurance policy upon which a recovery is sought in said action had or could have occurred,
9 and did specially set up and claim under the said sections of the Constitution and Revised Statutes an exemption and immunity from any forfeiture of said policy—

The court below erred in deciding against the exemption and immunity aforesaid so specially set up and claimed by plaintiff in error for the reason that it thereby did not give to said public act of the State of New York the "full faith and credit" required to be given thereto by said sections of the Constitution and Revised Statutes.

2. For the same reason and in like manner the court erred in holding that the provisions of said public act did not apply to that portion of the premium due March 16, 1897, upon said policy, for which portion thereof appellant's intestate, the insured in said policy, gave his promissory note dated 9, 16, '96.

3. For the same reason and in like manner the court erred in determining that the provisions of said public act did not apply to that portion of the premium due May 16, 1897, upon said policy, for which portion thereof said insured gave his promissory note dated 3, 16, '97.

4. For the same reason and in like manner the court erred in holding that having prior to the time the annual premium became payable in September, 1896, given the notice required by said public act, the defendant was not required to give any other notice.

5. For the same reason and in like manner the court erred in deciding that upon the failure of said insured to pay his said note dated 3, 16, '97, and due sixty (60) days thereafter at its maturity, his policy lapsed and was forfeited, defendant having admitted its failure to give the notice required by said public act within the requisite period prior thereto.

10 6. For the same reasons and in like manner, on account of the errors above specified having also occurred in the proceedings in said action in the district court in and for the county of Ramsey, in the State of Minnesota, from whence it was carried by appeal from an order denying plaintiff's motion for a new trial to the supreme court of that State, the latter erred in not reversing the said order and granting plaintiff a venire *de novo*.

7. For the same reasons and in like manner, on account of the errors above specified having also occurred in the proceedings and judgment in said action in said district court from which an appeal was taken to said supreme court of the State of Minnesota, the

latter erred in not reversing such judgment and not directing a venire *de novo* in said district court.

8. For the same reasons and in like manner the court erred in rendering judgment for the defendant, whereas by the law of the land said judgment ought to have been given for plaintiff and against defendant in error.

9. The court erred in holding that the New York court of appeals, in the case of Conway *vs.* Insurance Company, 140 N. Y., 79, intended to decide the question of the applicability of said provisions of said public act relative to notice to a portion of a premium for which the insured gives his promissory note under such circumstances and conditions as existed in the case at bar.

Wherefore plaintiff in error prays that such judgment may be reversed, annulled, and altogether held for nothing; that she may be restored to all things which she has lost by occasion of said judgment, and that the court proceed to a final decision and award execution or remand the same, with such directions as the case may require, etc.

Most respectfully,

CHRISTOPHER DILLON O'BRIEN,
Attorney for Plaintiff in Error.

April 11th, 1899.
In the October term, 1898.

11 [Endorsed:] 11366. In the Supreme Court of the United States. Louisa Banholzer, plaintiff in error, *vs.* The New York Life Insurance Company, a corporation, defendant in error. Assignments of error. Christopher Dillon O'Brien, attorney for plaintiff in error.

Endorsed: Filed Apr. 20, 1899. Darius F. Reese, clerk.

12 In the Supreme Court of the State of Minnesota.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Corporation, Respondent.

Assignments of Error upon Appeal from Judgment.

Now comes Louisa Banholzer, said appellant, and avers that in the proceedings and judgment in the lower court in the above-entitled cause manifest error occurred in this:

1. The court erred in holding that the provisions of the New York statute (Session Laws of 1892, ch. 690, sec. 92) pleaded in the complaint did not apply to that portion of the premium due March 16, 1897, upon the policy of appellant's intestate, for which portion of such premium said insured gave his promissory note dated 9, 16, '96, because in so holding the court did not give to said provisions of said statute the "full faith and credit" secured to them and claimed for them by appellant by virtue of section 1 of article IV of the Constitution of the United States.

2. For the same reason and in like manner the court erred in holding that the said provisions of said statute did not apply to that portion of the premium due May 16, 1897, upon said policy, for which portion of such premium said insured gave his promissory note dated 3, 16, '97.

3. For the same reason and in like manner the court erred in holding that having, prior to the time the annual premium became payable in September, 1896, given the notice required
13 by said statute, the defendant was not required to give any other notice.

4. For the same reason and in like manner the court erred in holding that upon the failure of said insured to pay his said note dated 3, 16, '97, due sixty days thereafter, at its maturity, his policy lapsed and was forfeited, the respondent having admitted, by its answer and by its counsel in open court, its failure to give within the proper period prior thereto the premium notice required by said statute.

5. For the same reason and in like manner the court erred in dismissing the action upon motion of respondent after the introduction of appellant's evidence.

6. The court erred in denying appellant's motion for a new trial, for that she was entitled to the same on account of the errors of the court occurring at the trial and specified in the foregoing assignments.

7. For the reasons stated in the foregoing assignment of error numbered one (1), the judgment appealed from is erroneous.

Wherefore appellant prays that said judgment be reversed.

C. D. & THOS. D. O'BRIEN,
Attorneys for Appellant.

FREDERICK W. FOOT, *Of Counsel.*

14 [Endorsed:] 11366. In the supreme court of the State of Minnesota. Louisa Banholzer, appellant, *vs.* New York Life Insurance Company, a corporation, respondent. Assignments of error.

Endorsed: Filed Apr. 6, 1899. Darius F. Reese, clerk. Frederick W. Foot, of counsel.

15 (Copy.)

STATE OF MINNESOTA, }
Department of Insurance. }

ST. PAUL, MINN., *April* 11, 1899.

I, J. A. O'Shaughnessy, insurance commissioner of the State of Minnesota, do hereby certify that the American Bonding & Trust Company of Baltimore City is a corporation organized under the laws of the State of Maryland and is authorized under its charter to guarantee fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings

required or permitted in actions and proceedings at law; that it appears to my satisfaction, from sufficient evidence on file in my office of commissioner of insurance of said State of Minnesota, that said corporation, the American Bonding & Trust Company of Maryland, has furnished the same security which is required by law and the regulations of my department of life insurance companies, under the provisions of sections 355 to 358, inclusive, of chapter 34, General Laws of the State of Minnesota of one thousand eight hundred and seventy-eight (1878).

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] J. A. O'SHAUGHNESSY,
Insurance Commissioner.

Revenue stamp.

16 In the Supreme Court of the United States.

LOUISA BANHOLZER, Plaintiff in Error,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, The American Bonding and Trust Company of Baltimore City, a Maryland corporation, duly licensed in Minnesota, are held and firmly bound unto The New York Life Insurance Company, above-named defendant in error, in the sum of one thousand dollars ($1,000.00), to be paid to the said New York Life Insurance Company or its successors; to which payment, well and truly to be made, we bind ourselves and our successors firmly by these presents.

Sealed with our seals and dated this 11 day of April, A. D. 1899.

Whereas the above-named Louisa Banholzer hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Louisa Banholzer shall prosecute her said writ of error to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By EDWARD J. MEIER, *Vice-Pres't.*

Attest: JAMES A. NOWELL, *Ass't Sec'y.* [SEAL.]

Delivered in presence of—
M. P. MORIARTY.
JAS. J. FARRELL.

Revenue stamp.

17 STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 11th day of April, 1889, before me personally appeared James A. Nowell, assistant secretary of the American Bonding and Trust Company of Baltimore City, Baltimore, Maryland, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of St. Paul, Minn.; that he is assistant secretary of said corporation, the American Bonding and Trust Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as assistant secretary of said corporation by like authority; and the said James A. Nowell further said that he is acquainted with Edward J. Meier and knows him to be a vice-president of said company; that the signature of said Edward J. Meier subscribed to the said instrument is the genuine handwriting of the said Edward J. Meier, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said James A. Nowell, assistant secretary, and the said James A. Nowell acknowledged said instrument to be the free act and deed of said corporation.

[L. S.] M. P. MORIARTY,
Notary Public, Ramsey County, Minnesota.

[Endorsed:] 11366. From American Bonding and Trust Company of Baltimore City to New York Life Insurance Co. I hereby approve the within obligation. Chas. M. Start, chief justice.
Endorsed: Filed Apr. 20, 1899. Darius F. Reese, clerk.

18 STATE OF MINNESOTA:

Supreme Court, October Term, 1898.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff alleges:

That during all the times hereinafter stated she has been and still is a citizen and resident of the city of St. Paul in the county of Ramsey and State of Minnesota. That the above-named defendant is a life insurance company, duly created and existing under
19 and by virtue of the laws of the State of New York, and that said company during all of the times aforesaid has been and

still is lawfully transacting business within the State of Minnesota as such insurance company.

Plaintiff further alleges that for many years last past and up to the 5th day of July, A. D. 1897, she was the wife of one William Banholzer who was a citizen and resident of said city of St. Paul. That upon the said 5th day of July, 1897, at said city of St. Paul, the said William Banholzer died, leaving him surviving this plaintiff who is his widow.

And plaintiff further alleges, that heretofore, to wit: upon the 16th day of September, 1895, the above-named defendant for a valuable consideration then and there paid to it by the said William Banholzer, issued and delivered to him its (said defendant's) certain policy of insurance dated on said 16th day of September, 1895, and numbered 692,465, wherein and whereby the said defendant promised and agreed (among other things) to pay to this plaintiff—the wife of the said William Banholzer—the sum of $20,000, upon the occasion of the occurrence of the death of the said William Banholzer during the lifetime of this plaintiff, providing the death of said William Banholzer should occur prior to the 16th day of Septembe*a*, in the year 1915. And that in and by said policy said defendant as aforesaid agreed to pay said sum of $20,000, to this plaintiff upon the contingency of the death of the said William Banholzer prior to the 16th day of September, 1915, at the home office of said defendant in the city — New York immediately upon the receipt by it and approval of the proofs of death of the said William Banholzer.

And this plaintiff further alleges—that said policy was issued and so delivered as aforesaid in consideration of (among other things) the payment to the said defendant of an annual premium of $1,146, to be paid in advance on the 16th day of September in every year during the continuance of said policy until twenty full years' premiums should have been paid.

And this plaintiff further alleges—that the said William Banholzer paid to the said defendant on the 16th of September, 1895, the full amount of said premium, to wit: the sum of $1,146 which payment continued said policy in force up to and until the 16th day of September, 1896.

And this plaintiff further alleges—that on the 6th day of October, 1896, the said William Banholzer paid to the said defendant upon account of and in payment of the annual premium due upon said policy on the 16th day of September, 1896, the sum of $286 in cash, and the promissory note of the said William Banholzer payable to the order of the said defendant, which said note was then and there dated the 16th day of September, 1896, and was for the sum of eight hundred and sixty dollars ($60), payable at the Second national bank, St. Paul, Minnesota, six months after the date thereof, with interest thereon at the rate of five per cent. per annum. And that said defendant then and there received said note and said cash in payment of said premium so due upon said policy upon the said

16th day of September, 1896, and then and there duly waived
21 all the terms and conditions of said policy making said premium payable in advance.

Plaintiff further alleges,—that thereafter and on the 16th day of March, 1897, the said William Banholzer paid to the said defendant for and on account of and in payment of said promissory note by him delivered to said defendant as aforesaid, the sum of two hundred forty-one and 50/100 dollars ($241.50), and then and there made, executed and delivered to the said defendant his (said Banholzer's) certain promissory note in writing dated on that day for the sum of six hundred and thirty-nine and 50/100 dollars ($639.50), payable in sixty days after date with interest thereon at the rate of five per cent. per annum, and which said last note was also payable at the Second national bank to defendant aforesaid.

And plaintiff alleges that said defendant then and there surrendered to said William Banholzer said promissory note for eight hundred and sixty dollars ($860) and accepted and received from him said cash and said second note hereinbefore described in full payment thereof. And that said defendant then and there for a valuable consideration to it moving again waived the payment by the said Banholzer in cash at that time of the balance unpaid upon said annual premium last referred to.

And this plaintiff further alleges,—that the said defendant has ever since kept and retained said promissory note for six hundred and thirty-nine and 50/100 dollars ($639.50) and has never delivered or offered to deliver or surrender the same to the said William Banholzer in his lifetime or to this plaintiff.

22 And this plaintiff further alleges,—that the said William Banholzer shortly after the maturity of said note last aforesaid, tendered the said defendant the full amount of said note and interest, both in cash and by draft, being such draft as is provided by the terms of said policy, may be used in payment of such premiums. That said tenders were made to the said defendant both at the city of St. Paul, Minnesota, to its duly authorized representative there and also to its general officers in the city of New York. but that said defendant refused to accept such payment and still continued and now continues to hold such promissory note and refused to surrender the same to the said William Banholzer in his lifetime, or this plaintiff since his death. That up to the time of his death the said William Banholzer was always ready and willing to pay the said defendant the full amount of said promissory note together with the interest thereon, and that ever since his death this plaintiff has been ready and willing and is now ready and willing to pay said promissory note, and that said tenders so made by the said William Banholzer in his lifetime to pay said promissory note have always been kept good.

And this plaintiff further alleges,—that during the lifetime of the said William Banholzer and after said second promissory note for six hundred and thirty-nine and 50/100 dollars ($639.50) had matured, and on the 26th day of May, 1897, the said defendant for a valuable consideration again in all things and expressly waived the

provisions of said policy touching the payment in advance of said premium so as aforesaid due on the 16th day of September, 1896.

23 And plaintiff further alleges,—that the said several promissory notes so given by the said William Banholzer and the several cash payments so made by the said William Banholzer for and on account of said premium so originally due upon the 16th day of September, 1896, were made by the said William Banholzer and received by the said defendant in full payment of said premiums and the whole of the same, and that in and by the making of said payments and said promissory notes and the receipt of and delivery to the defendant of the same and all of the same and in consideration thereof, and of other valuable considerations unto it moving, the said defendant duly and in all things waived all the provisions of said policy requiring the full payment of said premium to be made in cash in advance.

And plaintiff further alleges,—that said William Banholzer died at the said city of St. Paul upon the 5th day of July, A. D. 1897. That at the time of his death the said policy was in full force and effect, and that upon his said death and the making to the said defendant of the proper proof of the same, this plaintiff became and was and is entitled to the payment of said policy in full. That thereupon this plaintiff caused to be made and so served upon the said defendant due notice of the death of said William Banholzer and that thereafter and on the 14th day of December, 1897, this plaintiff prepared and caused to be served upon the said defendant at its home office in the city of New York, due and sufficient proofs

24 of the death of said William Banholzer, which said proofs were received and accepted by the said defendant and which said proofs it has ever since retained. That thereafter and prior to the commencement of this action this plaintiff duly demanded of said defendant the payment to her of the said sum of twenty thousand dollars ($20,000), due upon said policy as aforesaid, but that said defendant refused and still refuses to pay the same or any part thereof, and denies all liability to this plaintiff upon said policy. And plaintiff hereby refers to said policy and all the terms and conditions thereof for a greater certainty.

And this plaintiff further alleges—that at the time of the issuance of said policy and at the time of the death of the said William Banholzer, and at time of the bringing of this action there existed and still exists in the said State of New York a certain statute, which statute was duly enacted by the legislature of the State of New York and which has been during all of the aforesaid times and now is a valid and subsisting statute of said State. That said statute (among other things) provides as follows:

"SECTION 92. Non-forfeiture of policy without notice.

No life-insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums or unless the same is a term insurance company for one year or less, nor shall any such policy be forfeited or lapsed by reason of

non-payment when due of any premium, interest or installment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount
25 of such premium, interest or installment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last-known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the rights of a surrender-value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made in the time limited therefor, it shall be taken to be in full compliance of the requirements of the policy in respect to the time of payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing the policy, shall be presumptive evidence that such notice has been duly given."

26 And this plaintiff alleges and avers that neither the said defendant or anybody on its behalf or any officer of said defendant served, sent or mailed or caused to be mailed to the said William Banholzer in his lifetime or to this plaintiff, any notice of the maturity or the time of the maturity of the said promissory note for said sum of six hundred and thirty-nine and 50/100 dollars ($639.50), which said note by its terms became due and payable on the 15th day of May, 1897. And that no notice as required by said statute of the said State of New York hereinbefore referred to concerning the maturity of either of said notes so given by the said Banholzer in payment of said premium was ever made, served, mailed or sent to either the said Banholzer in his lifetime or to this plaintiff at any time.

Wherefore this plaintiff prays judgment against the said defendant for the sum of twenty thousand dollars ($20,000) with interest thereon from the 14th day of December, 1897, at the rate of seven per cent. per annum, less the amount which may remain unpaid upon said promissory note for six hundred and thirty-nine and 50/100 dollars ($639.50) last above described, and for her costs and disbursements herein.

C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff, 212 *Globe Bldg., St. Paul, Minn.*

27 STATE OF MINNESOTA, }
County of Ramsey, } ss:

Louisa Banholzer came before me personally, and being duly sworn, doth say that she is the plaintiff in the above-entitled action; that the foregoing pleading is true of her own knowledge, except as to the matters which are therein stated on her information and belief, and as to those matters that she believes it to be true.

LOUISA BANHOLZER.

Subscribed and sworn to before me on this 4th day of January, A. D. 1898.

E. M. FARMER,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed January 5, 1898. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

Answer.

28 Now comes the defendant above named, The New York Life Insurance Company, and for answer to the complaint of the plaintiff herein, said Louisa Banholzer, respectfully shows to the court—

Defendant admits each and all the allegations, matters and things contained in the first two paragraphs of said complaint, concluding with the words "who is his widow" in the third line of the third folio of said complaint.

Defendant further admits that on the 16th day of September, 1895, defendant issued to said William Banholzer mentioned in said complaint, defendant's certain policy of insurance dated the 16th day of September, 1895, numbered 692,465, whereby defendant promised and agreed upon certain conditions named in said policy, to pay to said plaintiff above named, the wife of said William Banholzer, the sum of twenty thousand dollars in the event of the death of said William Banholzer during the lifetime of said plaintiff, providing the death of said William Banholzer should occur prior to the 16th day of September in the year 1915, which payment it was agreed in and by said policy, should be made at the home office of the defendant in the city of New York, upon the receipt by defendant of proof that the death of said William Banholzer had occurred during said period above named; but defendant expressly alleges that in and by said policy, it was expressly provided that said William Banholzer should pay unto said defendant at the date

of the delivery of said policy, the sum of eleven hundred and forty-six dollars ($1,146.00), and should pay unto said defendant each and every year, thereafter upon the 16th day of September of each and every year, until and including the 16th day of Septem-
29 ber, 1914, the sum of eleven hundred and forty-six dollars ($1,146.00) as an annual premium thereon, and said policy was issued and delivered upon the condition therein expressly set forth that said policy, should at once become void in case any premiums so to be paid upon said policy, should not be paid on or before or within thirty days after the date when the same should become due in accordance with the terms of that policy, and that all payments previously made, should in such case remain the property of said defendant: all of which will more fully appear from a true copy of said policy which is hereto annexed and made a part of this answer and marked Exhibit "A."

Defendant further admits and alleges that said policy was issued and delivered to said William Banholzer in consideration, among other things, of the payment to defendant of the first annual premium payable thereunder, which said premium was paid to defendant on or about the 16th day of September, 1895, and that the payment of said sum eleven hundred and forty-six dollars ($1,146.00) made by said William Banholzer to defendant as aforesaid, operated to continue said policy in force up to and until the 16th day of September, 1896, but no longer.

Defendant further alleges that the second premium, amounting to eleven hundred and forty-six dollars ($1,146.00) upon said policy, became due and payable upon said 16th day of September, A. D. 1896.

Defendant alleges that said William Banholzer failed to pay the premium of eleven hundred and forty-six dollars ($1,146.00)
30 that became due on the 16th day of September, 1896, on said day, and at all times thereafter, but defendant admits that on or shortly after said 16th day of September, 1896, and prior to the 16th day of October, 1896, said William Banholzer paid unto defendant on account of said premium due September 16th, 1896, the sum of two hundred and eighty-six dollars ($286.00) in cash, and that said William Banholzer then and there executed and delivered to defendant his promissory note, dated the 16th day of September, 1896, whereby said William Banholzer promised to pay to the order of defendant, at the Second national bank, St. Paul, Minnesota, and six months after the date thereof, the sum of eight hundred and sixty dollars ($860.00), which said note bore interest at the rate of 5 per cent. per annum; that said note was in the words and figures following, tnat is to say:

Pol. 692,465.

ST. PAUL, MINN., 9–16, 1896.

Without grace six months after date I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second national bank, St. Paul, Minn., value received, with interest at the rate of 5 per cent. per annum.

This note is given in part payment of the premium due 9–16–'96 on the above policy, with the understanding that all claims to further insurance, and all benefits whatever which full payments of cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Com-
31 pany, if this note is not paid at maturity, except as otherwise provided in the policy itself. $860.00.

(Signed) WM. BANHOLZER.

And defendant alleges that at the time said note last above mentioned was delivered by said Banholzer to said defendant and was by said defendant accepted said defendant executed and delivered unto said Banholzer a receipt for the cash paid by said Banholzer and for said note, which said receipt was then and there accepted by said Banholzer; that said receipt was in the words and figures following, that is to say:

New York Life Insurance Company, 346–348 Broadway, New York.

Cash, $286.00.

ST. PAUL, MINN., 10–5–'96.

Note 6 mo. dated 9–16–'96, due 3–16–'97, without grace. Made by William Banholzer. Payable at Second national bank, St. Paul, Minn.

Received from the owner of policy No. 692,465, $286.00, in cash, and his note at six months for $860.00 which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by—

J. A. CAMPBELL, *Cashier.*

And defendant alleges that said William Banholzer in and by the execution and delivery of said note and acceptance of said receipt expressly agreed in consideration of the premises and of the acceptance of said note and the execution and delivery of said
32 receipt by defendant, and it was then and there so agreed and understood by and between said William Banholzer and defendant that said policy should, if said William Banholzer should fail to pay said note in full, principal and interest, upon or before the day of the maturity thereof, at once become absolutely void, and that all insurance of the life of, and all claim to insurance on the part of said William Banholzer, should thereupon at once cease and be void.

And defendant expressly alleges that said note and said receipt comprised and do comprise and evidence the contract and agreement and the whole and every contract and agreement, under which said note was executed and delivered by said William Banholzer and accepted by this defendant. Defendant denies that it then and there received said note and said cash in payment of said premium so due upon said policy upon the 16th day of September, 1896; and defendant denies that it did in or by the acceptance by it of

said note of September 16th, 1896, or in the issuance of said receipt, or at any time or in any manner, duly or at all waive all or any of the terms or conditions of said policy, whether those requiring said premium to be paid in advance, or any other of said terms or conditions.

Defendant alleges that said note dated September 16th, 1896, and executed and delivered unto defendant by said William Banholzer, became due and payable upon the 16th day of March, 1897, but that said Banholzer then and there failed to pay the same, whether in accordance with the terms thereof or otherwise, and that
33 said Banholzer never has paid said note or any part thereof, save and except as hereinafter stated.

Defendant admits and alleges that on or about the 16th day of March, A. D. 1897, said Banholzer paid unto defendant for and on account of and in part payment of the indebtedness evidenced by said note dated September 16th, 1896, and of said premium due on said 16th day of September, 1896, the sum of two hundred and forty one and 50/100 dollars ($241.50), and then and there made, executed and delivered unto defendant, said Banholzer's other promissory note in writing, dated on said 16th day of March, 1897, whereby said William Banholzer promised to pay to the order of defendant sixty days after the date thereof, at the Second national bank, St. Paul, Minnesota, the sum of six hundred and thirty-nine dollars ($639.00) with interest thereon at the rate of 5 per cent. per annum; that said note dated March 16th, 1897, was in the words and figures following: that is to say,

Pol. 692,465.

St. Paul, Minn., 3, 16, 1897.

Without grace, two months after date, I promise to pay to the order of the New York Life Insurance Company, six hundred and thirty-nine dollars, at Second national bank, St. Paul, Minn. Value received, with interest at the rate of 5 per cent. per annum.

This note is given in part payment of the premium due 3-16-'96 on the above policy, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become
34 immediately void and be forfeited to the New York Life Insurance Company if this note is not paid at maturity, except as otherwise provided in the policy itself.

(Signed) WILLIAM BANHOLZER.

$639.00.

That defendant then and there surrendered to said William Banholzer said promissory note for eight hundred and sixty dollars ($860.00) dated September 16th, 1896; but defendant expressly alleges that said William Banholzer in and by the execution and delivery of said note dated March 16th, 1897, expressly agreed with the defendant, in consideration of the premises and the acceptance by the defendant of said note dated March 16th, 1897,

as aforesaid, and it was then and there so agreed and understood by and between said William Banholzer and defendant, that said policy should at once become, and thereafter be absolutely void, if said William Banholzer should fail to pay said note dated March 16th, 1897, in full, principal and interest, on or before the day of the maturity thereof.

Defendant alleges that the entire agreement, contract and understanding between the said William Banholzer and defendant, entered into at the time of the execution and acceptance of said note dated March 16th, 1897, is expressly set forth and comprised in said note.

35 Defendant denies that defendant at the time of the acceptance by it of said note dated March 16th, 1897, or at any time or in any way, manner or respect, waived the payment by said William Banholzer in cash either at that time or at any time, of the balance unpaid upon said annual premium due upon September 16th, 1896.

Defendant further alleges that said note of said William Banholzer dated March 16th, 1897, matured, and according to its terms, became payable on the 15th day of May, 1897, and that said Banholzer did not on said day or at any time either before or after said day, pay said note or any part thereof, although payment of said note was duly demanded of said William Banholzer on said day, and that said Banholzer did not on said day, or at any time prior thereto (or except as hereinafter stated, at any time) tender to this defendant, the amount of said note or any amount in payment or part thereof, and defendant alleges that by reason of the failure of said Banholzer to pay said note in accordance with its terms, the policy of said Banholzer above mentioned, was forfeited, lapsed and became null and void, and that this defendant then and there declared the policy of said Banholzer forfeited, lapsed, null and void, and then and there notified said Banholzer that said policy had been so forfeited and had lapsed and become null and void.

Defendant further alleges that shortly thereafter said William Banholzer was stricken with a mortal illness and was confined to his bed, and that the illness with which said Banholzer was then

36 and there stricken, continued and increased without intermission, until his death, which occurred as alleged in said complaint, on or about the 5th day of July, 1897, that after said Banholzer was so stricken ill and was suffering his last sickness as aforesaid, and was confined to his bed therewith, and on or about the 18th day of June, 1897, one F. G. B. Woodruff, purporting to be the attorney for said Banholzer, tendered to the cashier of the branch office of defendant, located at St. Paul, Minnesota, the sum of six hundred and ninety dollars (690.00) pretending to tender the same on behalf of said William Banholzer, in payment and settlement of said note dated March 16th, 1897, and that thereafter, said Woodruff, purporting to be the attorney of said Banholzer, tendered to the officers of the defendant at its home office in the city of New York, a certain draft drawn by the Second National Bank of St. Paul, Minnesota, upon its correspondents in the city of New York

and payable to the order of this defendant, for the sum of six hundred and ninety dollars ($690.00) which said draft was stated by said Woodruff to be tendered to defendant in payment and settlement of said note; and defendant admits and alleges that both said tenders were by said defendant declined; that said defendant in each case refused to accept said sum of six hundred and ninety dollars ($690.00), or any other sum in payment of said note, stating to said Woodruff that said policy above mentioned, had lapsed and was forfeited and void. Defendant admits that defendant has ever since the same was received by it, retained in its possession said promissory note for six hundred and thirty-nine dollars ($639.00) dated March 16th, 1897, and alleges that neither said William
37 Banholzer, nor anybody upon his behalf, nor said Louisa Banholzer, plaintiff herein, nor anybody on her behalf, has ever demanded or requested that said defendant should deliver said note to them or any one of them. Defendant alleges that it retains said note as evidence of the contract contained therein between said William Banholzer and this defendant, and for its own protection, and as it has the right to do.

Defendant expressly denies that said William Banholzer was always ready and willing to pay defendant the full amount of said promissory note together with the interest thereon, and expressly alleges that at the date of the maturity of said note and afterwards, and at all times prior to said 18th day of June, 1897, said William Banholzer expressly refused to pay the amount of said note or any part thereof.

Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the matters, allegations or things set out in that portion of said complaint beginning with the words "and that ever" at the end of the third line of the thirteenth folio of said complaint, and concluding with the words "kept good" at the conclusion of the seventh line of said thirteenth folio of said complaint.

Defendant expressly denies each and every allegation, matter and thing contained in the paragraph of said complaint beginning with the words "and this plaintiff" in the eight line of the thirteenth folio of said complaint, and concluding with the words "September, 1896," at the conclusion of the fifth line of the fourteenth
38 folio of said complaint; and defendant expressly denies each and every allegation, matter and thing, contained in that portion of said complaint beginning with the words "and plaintiff further alleges" in the sixth line of the fourteenth folio of said complaint, and concluding with the word "same," being the first word in the third line of the 15th folio of said complaint.

Defendant expressly denies that in or by the making of said payments and said promissory notes by said William Banholzer, or the receipt of and delivery to defendant of the same or all the same, or in consideration thereof, or of any other consideration unto defendant moving, or by or on account of any other act, matter or thing defendant ever in any way or respect, waived any provision of said policy whatever; and defendant expressly denies that it ever at any

time or in any way, manner, form or in any respect or particular, waived any requirement, provision, stipulation or condition of said note dated March 16th, 1897, or the forfeiture of said policy, which at once resulted from the failure of said William Banholzer to pay said note on or before the day of its maturity.

Defendant admits that said William Banholzer died at the city of St. Paul on the 5th day of July, 1897. Defendant expressly denies that at the time of the death of said Banholzer, said policy was in full force and effect, and as well that upon the death of said Banholzer and the making to defendant of the proper proofs of the same, the plaintiff herein, or any one, became or was or is entitled to the payment of said policy in full, or to the payment of
39 any amount upon said policy. And defendant expressly alleges that at the time of the death of said Banholzer, said policy had lapsed, had become forfeited and was absolutely void.

Defendant admits that plaintiff caused to be served upon defendant, notice of the death of said William Banholzer, and that thereafter, and on or about the 14th day of December, 1897, plaintiff caused to be served upon defendant at its home office in the city of New York certain affidavits purporting to be proofs of death of said Banholzer, and that defendant had retained said proofs.

Defendant admits that plaintiff has demanded of defendant the payment to her of the sum of twenty thousand dollars ($20,000) claiming that the same was due upon the policy aforesaid, and that defendant has refused and still refuses to pay the same or any part thereof, and defendant denies, and defendant does hereby deny, all liability to plaintiff upon said policy.

Defendant admits each and all the allegations, matters and things in that portion of said complaint contained beginning with the words "and this plaintiff further alleges," in the fourth line of the eighteenth folio of said complaint, and concluding with the words "has been duly given" in the first line of the twenty-third folio of said complaint.

Defendant denies each and every allegation, matter and thing contained in that portion of said complaint beginning with the words "and this plaintiff alleges" in the second line of folio
40 twenty-three of said complaint, and concluding with the words "at any time" in the fifth line of folio twenty-four of said complaint.

Defendant expressly alleges that at least fifteen days, and not more than forty-five days, prior to the day upon which said premium of eleven hundred and forty-six dollars (1,146.00) was due upon said policy; that is to say, at least fifteen days and not more than forty-five days prior to the 16th day of September, 1896, defendant duly caused a written or printed notice, stating the amount of said premium due on said policy, the place where it should be paid, and the persons to whom the same was payable, to be duly addressed and mailed to said William Banholzer at his then post-office address in the city of St. Paul, and that the postage was duly paid by the defendant upon such notice; that said notice also stated that unless said premium so to become due should be paid

to defendant or its duly appointed agent therein named, authorized to collect such premium, by or before the day such premium should fall due, said policy above mentioned and all the payments thereon would become forfeited and void, and that said notice in all things complied with the provisions of the statute of the State of New York set out in said complaint; and defendant duly caused to be given every notice required by the statutes of such State of New York to be given concerning or in the matter of said policy. And defendant further alleges that prior to the maturity of said note of said William Banholzer dated March 16th, 1897, for the sum of
41 six hundred and thirty-nine dollars ($639.00); that is to say, prior to, said 15th day of May, 1897, notice of the fact that said note would mature and be payable upon said date, was duly given to said William Banholzer.

Defendant expressly denies each and every allegation, matter and thing in said complaint contained, except such thereof as are herein expressly admitted.

Wherefor- defendant demands judgment that plaintiff shall take nothing by this action, and for its costs and disbursements therein most unjustly sustained.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant, 404 *N. Y. Life Bldg.*,
St. Paul, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Frank W. M. Cutcheon, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the foregoing-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by one of the officers of said defendant is that all of the officers of said defendant are absent from the county of
42 Ramsey and State of Minnesota, wherein resides this affiant and all of defendant's attorney- in this action.

FRANK W. M. CUTCHEON.

Subscribed and sworn to before me this 25th day of January, A. D. 1898.

FITZHUGH L. BURNS,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed: Filed February 18th, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

1845. 1895.

No. 692,465.

$20,000.

New York Life Insurance Company, by this policy of insurance agrees to pay twenty thousand dollars to Louisa, wife of the insured, or in the event of her prior death, to the insured's executors,

administrators or assigns, at the home office of the
Age, 46. company in the city of New York, immediately upon receipt and approval of proofs of the death of William Banholzer of St. Paul in the county of Ramsey State of Minnesota (herein called the insured).

43 And the company further agrees to pay twenty thousand dollars to the insured, or assigns, on the sixteenth day of September in the year nineteen hundred and fifteen at the home office of the company in the city of New York, if the insured shall be living on that date; and this policy shall thereupon cease and determine.

And the company further agrees that this policy shall be incontestable after it has been in force one full year, if the premiums have been duly paid as provided herein.

This contract is made in consideration of the written application for this policy, which is hereby made a part of this contract, and in further consideration of the sum of eleven hundred
Annual premium $1,146. and forty-six dollars and — cents, to be paid in advance, and of the payment of a like sum on the 16th day of September, in every year thereafter during the continuance of this policy, until twenty full years' premium shall have been paid.

The benefits and provisions placed by the com-
Examined. pany on the next page are conditions precedent and are a part of this contract as fully as if they were recited at length over the signature hereto affixed.

In witness whereof, the New York Life Insurance Company, has by its duly authorized officers, signed and delivered this
J. J. contract, this sixteenth day of September, one thousand eight hundred and ninety-five.

JOHN A. McCALL, *President.*

C, endowment accumulation. —— ——, *Secretary.*

44 (Written across face.)

N. Y. L. I. C.

(Copy.)

Benefits and Provisions.

This policy participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period.

The accumulation period of this policy ends on the 16th day of September, in the year nineteen hundred and fifteen.

The insured shall then be entitled, if living, and if the premiums have been duly paid in full, to select and receive one of the three benefits following:

First. To discontinue this policy and receive its entire cash value as stated below, in cash; or

Second. To discontinue this policy and to receive its entire cash value as stated below, converted into an annuity; or

Third. To discontinue this policy and to receive its entire cash value as stated below, converted into paid-up insurance payable at death only, without participation in surplus, subject to evidence of good health satisfactory to the company.

This company guarantees that the entire cash value of this policy at the end of the accumulation period shall be twenty thou-
45 sand dollars ($20,000), and in addition the dividend then apportioned by the company.

This policy participates in surplus only as hereinbefore provided.

The company will make advances as loans on this policy within the month of grace allowed in payment of premiums, on application to the home office, at the fifth or any subsequent anniversary of the insurance, under the terms of the company's loan agreement then in use, and following conditions:

First. That premiums have been paid in full to the time when loan is made, including the premium for the entire insurance year then beginning.

Second. That the company will loan at the fifth or any subsequent anniversary up to the tenth, such amounts as the insured may desire, not exceeding in all $3,480—at the tenth or any subsequent anniversary up to the fifteenth, such amounts as the insured may desire, not exceeding in all $7,680; at the fifteenth or any subsequent anniversary up to the twentieth, such amounts as the insured may desire, not exceeding in all $12,900. The amount of any loan shall include any previous loans then unpaid.

Third. That this policy will be duly assigned to the company as collateral security for the loan, and deposited at the home office. A copy of the loan agreement will be furnished to the insured.

46 Fourth. That interest at the rate of five per cent. per annum shall be paid on all loans at the next subsequent anniversary of the insurance, and annually thereafter until the loans have been paid off.

Fifth. That the loans shall be for such time as the insured may desire, not longer, however, than to the end of the accumulation period.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agents. If any premium is not paid on or before the day when due, this policy shall become void; and all payments previously made shall remain property of the company, except as hereinafter provided.

A grace of one month will be allowed in payment of subsequent premium after this policy *deal* have been in force three
47 months, subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remain- due and unpaid. During the month of grace this policy remains in force, and the unpaid premium, with interest as above, remains and indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month.

This policy will be reinstated on written application therefor within six months after the non-payment of any premium, subject to evidence of good health satisfactory to the company, and payments of premiums to date of reinstatement with interest at the rate of five per cent. per annum.

Proof of death must be furnished to the company at the home office within one year after the death of the insured, which proofs shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's forms in use at the time of the death of the insured. If it is found that the age of the insured was incorrectly stated in the application on which this policy was issued, the amount payable under this policy shall be such proportion of the amount of policy as the premium bears to the required premium at the true age.

Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.

48 Any assignment of this policy must be made in duplicate, and both sent to the home office, one duplicate to be retained by the company and the other to be returned. The company has no responsibility for the validity of any assignment.

This policy cannot be forfeited after it shall have been in force three full years, as hereinafter provided.

First. If any premium subsequently due is not paid as hereinafter provided, this policy will be continued for its full amount, payable only if the insured dies within the continued period, with a reduced amount payable only if the insured survives the continued period, as provided in the table below subject to the conditions of this policy, but without further payment of premiums, and without loans and participation in surplus; or

Second. If any premium subsequently due is not paid as hereinbefore provided, this policy will be endorsed for the reduced amount of paid-up insurance provided in the table below, if demand is made therefor with surrender of this policy within six months thereafter, subject to the conditions of this policy, but without further payment of premiums and without loans or participation in surplus.

This policy has been placed in the company's liquor dealers' class, without extra premium, and in consideration thereof, the ascertainment of the surplus to be apportioned to this policy
49 shall be based upon the mortality experience in said liquor dealers' class.

Table of Guarantees if Payment of Premiums is Discontinued.

Provided there is no indebtedness against this policy (pursuant to the insurance law (chapter 690, Laws of 1892) of the State of New York).

If the premiums are paid.	(1st.) This policy will be continued for its full amount $20,000 with a reduced amount as hereinbefore provided.		Or (2nd.) This policy will be endorsed for the reduced am't of paid-up insurance as hereinbefore provided.
	Full amount continued.	Reduced am't if then living	
To Sept. 16, 1898.....	To Feb. 16, 1904	Of $ x	Of $3,000
" " " 1899.....	" June " 1907	" x	" 4,000
" " " 1900.....	" Oct. " 1910	" x	" 5,000
" " " 1901.....	" M'ch " 1913	" x	" 6,000
" " " 1902.....	" June " 1915	" x	" 7,000
" " " 1903.....	" Sept. " 1915	" 1,760	" 8,000
" " " 1904.....	" " " "	" 3,700	" 9,000
" " " 1905.....	" " " "	" 5,560	" 10,000
" " " 1906.....	" " " "	" 7,300	" 11,000
" " " 1907.....	" " " "	" 8,960	" 12,000
" " " 1908.....	" " " "	" 10,520	" 13,000
" " " 1909.....	" " " "	" 11,980	" 14,000
" " " 1910.....	" " " "	" 13,360	" 15,000
" " " 1911.....	" " " "	" 14,840	" 16,000
" " " 1912.....	" " " "	" 16,260	" 17,000
" " " 1913.....	" " " "	" 17,580	" 18,000
" " " 1914.....	" " " "	" 18,840	" 19,000

Application to the New York Life Insurance Company.

1. Name of person applying for insurance on his life. William Banholzer.

NOTE.—Write the name in full.

2. *a.* Residence: State, Minnesota. County, Ramsey. Town, St. Paul. Street, Ave., 690 Stewart Ave.

50 *b.* Place of business, St. Paul, Minn.
Post-office address, Stewart, No. 690.

3. *a.* Present occupation or employment; if more than one state all.

Proprietor North Mississippi brewery (has nothing to do with handling the product), also stone contractor.

NOTE.—It is not sufficient to answer "merchant," "mechanic," "salesman," or "clerk;" the particular branch of business or trade must be specified and full particulars given, especially when the occupation is any way hazardous.

4. *a.* Place of birth. Germany.
b. Race or nationality. German.
c. Born on 27th day of September, 1849.
d. Age nearest birthday—46.

5. If you have any insurance on your life, state in what companies, when taken, the kinds of policies, and their respective amounts.
I have no such insurance except —
No.

NOTE.—By the word "companies" in this question is meant any company, association, society or order granting life insurance.

6. If any proposal or application to insure your life has ever been made to any company or agent, upon which a policy has not been issued of the kind applied for, state when, and to what company or agent.
51 No such proposal or application has ever been made except to —.
Has never been declined.

NOTE.—By the word "company" in this question is meant any company, association, society or order, granting life insurance.

7. *a.* To whom is the insurance applied for to be payable in event of death?
Louisa Banholzer.
the

NOTE.—Write name in full.

b. Present residence. St. Paul.
c. Relationship to you. Wife.
8. If the application is for an endowment policy, to whom is the endowment to be payable at its maturity?
To the insured.

NOTE.—This question must not be answered if the application is for insurance on any life table.

9. *a.* Do you desire an accumulation policy as set forth in the policy form of the company?
b. If so, which accumulation period do you select?
c. Do you desire a policy with "premium return" in case of death within the accumulation period?
d. If so, is such return to be equal to one-half, or all, the premiums paid.
a. Yes.
b. I select the 20-year accumulation period.
c. No.
52 *d.* Premium return to be equal to the prepaid.
10. Sum to be insured, $20,000.
Premiums payable—Annually.
On what table—Endowment, payable 20 years.

NOTE.—Strike out the rates and plans not desired.

I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application each of the above answers to be full, complete and true.
I agree, on behalf of myself and of any person who shall have or

claim any interest in any policy issued under this application, as follows: 1. That the foregoing "application," together with the "answers made to the medical examiner," shall be consideration for and the basis of the contract of the New York Life Insurance Company under any policy issued under this application; 2. That inasmuch as only officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on an application, and as they act on the written answers referred to, no statements, promises or information made or given by, or to, the person soliciting or taking this application for a policy or by or to any other person, shall be binding on the company or in any manner affect its rights unless such statements, promises or information be reduced to writing and presented to the officers of the company at the home office, in this application; 3. That in any distribution of surplus or apportionment of dividend, the
53 principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy, which may be issued under this application, shall be and are hereby ratified and accepted; 4. That the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has actually been paid to, and accepted by the company or its authorized agent during my lifetime and good health; 5. That no suit shall be brought against the company after two years from the time when the cause of action shall have arisen, nor after two years from the time of my death; 6. That the policy applied for shall be in the form now in use by the company, and that the contract contained in such policy and this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company.

Dated at St. Paul, this 9th day *day* of Sept., 1895.

Signature of the person applying for insurance. (Write the name in full.)

WILLIAM BANHOLZER.

Answer Made to the Medical Examiner.

95–47.

In continuation of and forming a part of my application for insurance to the New York Life Insurance Company, dated September 9th, 1895.

54 2. *a.* Have you ever been engaged in any other than your present occupation?

b. Do you contemplate making any change, temporary or permanent in your occupation?

c. Are you engaged in any way in the manufacture or sale of wine, spirits or malt liquors?

d. Have you ever been so engaged?

e. State each place of residence during the last ten years and which years in each place?

f. Do you contemplate making any change in your place of residence or making a journey? Yes or no. (If yes, give details here.)

a. Yes. Clerk in a wholesale dry-goods store.

b. No.

c. Yes. As prop'r of brewery—wholesale only.

d. Yes.

e. St. Paul, thirty-seven years.

f. No.

3. *a.* What is your daily consumption of wine, spirits or malt liquors?

b. What has it been in the past?

c. Have you at any time drunk any of them to excess?

d. Have you at any time taken or do you now take tobacco, opium, morphine, chloral, coca, or other drug to excess? (If yes, give full details here.)

55 *a.* About five glasses of beer a day.

b. As above.

c. No.

d. No. Smoke tobacco only and moderately.

4. *a.* Have you ever been examined for insurance without receiving a policy? (Name of company? Date? Cause?)

b. Have you ever been refused insurance on the plan applied for?

c. Is any negotiation for other insurance on your life now pending?

d. Have you ever obtained, or tried to obtain a pension?

a. No. (If yes, give details here.)

b. No.

c. No.

d. No.

5. Have you suffered since childhood from—

a. Headache (if severe), dizziness, fits, mental derangement, nervous prostration, sunstroke, paralysis or any disease of the brain or nervous system or from any disease of the eyes or ears?

b. Cough or hoarseness (chronic or persistent), asthma, spitting of blood, pleurisy, pneumonia, or any disease of the respi-tory organs?

c. Palpitation, or pain or distress about the heart, or any disease of the heart.

d. Diarrhœa, dysentery, dyspepsia (chronic), jaundice, liver complaint, colic (severe), gall-stones, fistula, peritonitis,

56 or any disease of the abdominal organs?

e. Rupture?

f. Rheumatism or gout?

g. Cancer or any tumor, malarial poisoning, small-pox or yellow fever?

h. Syphilis?

k. Difficult or frequent urination, renal colic, stone in the bladder, disease of the kidneys, or any disease of the urinary organs?

l. Stricture of the urethra or enlarged prostrate?

m. Any surgical operation, any injury, or any disease not already mentioned?

n. (If a woman) Uterine or pelvic disease, miscarriage, or abortion, difficult labor, disease of the breasts, or any disease peculiar to women?

o. If a policy is desired for the benefit of any other parson, is that person dependent on you for support?

p. Give name and address of your physician?

q. Give name and address of each physician consulted by you during past ten years, and cause for consultation?

Of each illness, give here its name, date, duration, results, and name of medical attendant.

a. No.
b. No.
c. No.
d. No.
57 *e.* No.
f. No.
g. No.
h. No.
k. No.
l. No.
m. No.
n. ——.
o. ——.
p. Dr. G. Stamm, St. Paul, (for family).
q. None.

6. *a.* What family do you resemble, your father's or mother's?

Father's.

58 *b.*	Age if living.	Condition of health.	Age at death.	Cause of death.	How long ill.	Where death was not clearly due to acute disease give details of last illness, and in case of parents the year of death.	Pr'vious health.
Father	76	Good					
Mother	66	Good					
Brothers	None living		9 years	Some disease of childhood	Few days		Good.
Sisters 1	44	Good	None d'd				
Father's father			No knowlg	No knowledge			
Father's mother			No knowlg	No knowledge			
Mother's father			95	Old age			Good.
Mother's mother			Ab't 50	No other knowledge			

59 *c.* Have any of your uncles or aunts suffered from consumption? (If so give full details.)

c. No.

I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, each of the above answers to be full, complete and true, and that I am temperate, and to the best of my knowledge and belief in sound physical condition, and a proper subject for life insurance.

I expressly waive on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Signature of the person applying for insurance:

WILLIAM BANHOLZER.

95–48.

(Endorsed on back:) New York Life Insurance Company. Insurance on the life of William Banholzer. Policy No. 692,465.
60 Amount, $20,000. Copy. Filed Feb. 18th, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant. }

The above-named plaintiff for her reply to the answer of the defendant in the above-entitled action, admits that the copy of the policy attached to said answer is a true copy of such policy. She admits that the copies of the receipt and two promissory notes set out in said answer are true copies of said receipt and of said two promissory notes.

And save as in this reply or in her complaint heretofore stated, admitted or qualified this plaintiff denies each and every statement, allegation and matter and thing in said answer contained and each and every part thereof.

61 Wherefore, she demands judgment as in her complaint herein heretofore demanded.

C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff, 212 *Globe Bldg., St. Paul, Minn.*

STATE OF MINNESOTA, } *ss.:*
County of Ramsey, }

Louisa Banholzer came before me personally, and being duly sworn, doth say, that she is the plaintiff in the above-entitled action;

that the foregoing pleading is true of her own knowledge, except as to the matters which are therein stated on her information and belief, and as to those matters, that she believes it to be true.

LOUISA BANHOLZER.

Subscribed and sworn to before me this 1st day of February, A. D. 1898.

C. D. O'BRIEN,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed Feb. 14, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

62 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant. }

Notice of Trial.

SIR: You will please take notice, that the issue of law and fact in the above-entitled action will be brought on for trial at the next general term of said court, to be held at the court-house in the city of St. Paul in said county, on Monday the 7th day of March, A. D. 1898, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Yours respectfully, C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff.

Dated Feb. 11th, 1898.

To Flandrau, Squires & Cutcheon, attorneys for defendant.

Endorsed: Filed Feb. 14th, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

63 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant. } 71882.

This cause came on for trial before Hon. Hascal R. Brill, with a jury on the morning of the 6th day of April, 1898.

Messrs. C. D. & T. D. O'Brien appeared as counsel on behalf of the plaintiff, and Messrs. Flandrau, Squires & Cutcheon appeared on behalf of the defendant.

Mr. C. D. O'Brien opened the case on behalf of the plaintiff to the court and jury.

Plaintiff offered in evidence the policy of insurance, No. 692,465, marked Pl'ff's Ex. A, and the same was received without objection.

Plaintiff offered in evidence receipt dated October 6, 1896, marked Pl'ff's Ex. B, and the same was received without objection.

Plaintiff offered promissory note, $860, dated September 16, 1896, marked Pl'ff's Ex. C, and the same was received without objection.

Plaintiff offered in evidence letter addressed by defendant
64 to William Banholzer, dated May 26, 1897, marked Ex. D, and the same was received without objection.

Plaintiff offered in evidence Pl'ff's Ex. E, letter from defendant to F. G. B. Woodruff, dated June 22, 1897, and the same was received without objection.

Mr. O'BRIEN: I offer in evidence letter of the defendant company to my firm, dated December 28, 1897.

Marked Pl'ff's Ex. F, and received without objection.

Mr. O'Brien then read the exhibits of plaintiff to the jury.

Mr. CUTCHEON: Mr. O'Brien, it is admitted I suppose that the draft was returned and received (I refer to Ex. F)?

Mr. O'BRIEN: Yes, we are not suing for the draft. We will get all there is or nothing.

A recess was here taken until 2 o'clock p. m., at which time court convened.

Mrs. LOUISA BANHOLZER, sworn as a witness on behalf of the plaintiff, testified:

Examined by Mr. C. D. O'BRIEN:

Q. Mrs. Banholzer, you are the plaintiff in this action?

A. Yes, sir.

Q. And you are the widow of Mr. William Banholzer?

65 A. Yes, sir.

Q. When was Mr. Banholzer taken sick?

A. The 28th of May.

Q. The 28th of last May?

A. Last May.

Q. Did his illness continue up to the time of his death?

A. His illness continued up to the time of his death.

Q. And he died on 5th of July, I believe?

A. Yes, sir.

Q. What was his mental condition after he was taken sick, whether or not he was in possession of his faculties or not, or did his mind go?

A. Well, at times his faculties were not what they ought to have been, when he was in a feverish state. But at other times his faculties were all right.

Q. Well, the majority of the time, from the time he was taken sick up to his death, was his mind affected?

A. Well, I don't know, I couldn't say that; at times it seemed to have been when he was under fever.

Q. I show the witness Plaintiff's Exhibit D, being letter of May 26th, will you look at that letter please, Mrs. Banholzer, was that received at the house some time directly after its date and during Mr. Banholzer's illness?

A. It was received on the 28th, the same day he laid down. He had laid down about two hours when this letter came.

66 Q. He had been in bed about two hours when this letter came?

A. When that letter came.

Q. Now, was there any other communication excepting that letter received from the insurance company, up to the time of his death?

A. Not at the house. Not to me, no.

Q. Not to your knowledge?

A. Not to my knowledge.

Q. Well, his mail came to the house there, did it not?

A. Yes, sir.

Q. And you had charge of it?

A. Yes, sir.

Q. And supervision?

A. Yes, sir.

Q. And nothing else came that you know of?

A. Nothing at all.

No cross examination.

Mr. O'BRIEN: Plaintiff admits that the premium notice required by the New York statute set out in the complaint was duly given more than fifteen and less than forty-five days prior to September 16, 1896, and the defendant will admit that no such notice was given within the corresponding period prior to the maturity of either the note dated Sept. 16, 1896, which is in evidence or the note dated March 16, 1897, the execution and form of which are admitted in the pleadings.

Mr. CUTCHEON: That is agreed. The only notice given

67 within the corresponding period prior to the maturity of either note was the ordinary bank notice by the Second National Bank of St. Paul.

Mr. O'BRIEN: That is all agreed to then.

The plaintiff then rested.

Mr. CUTCHEON: If your honor please, the defendant moves to dismiss on the ground that the plaintiff has failed to substantiate a cause of action.

After argument on the motion the court adjourned until 10 a. m. tomorrow, at which time court convened.

The COURT: During the adjournment I have considered as well as I could the question that was argued yesterday. It seems to me that there is nothing in this case to show any waiver of the stipulations of the parties that the policy should become void and rights

should cease if the note was not paid. The terms of the agreement which the parties entered into are clear, without a-biguity. They had a right to make such agreement if they chose. And they did stipulate that, if the note was not paid, the rights of the assured should terminate. Of course this stipulation could be waived, but I do not think it was waived by simply retaining the note. The note was not demanded, and it was not sought to enforce it in any way. Nor do I think the course of dealing between the parties was a waiver. The first note was given before the thirty days had expired, and was given upon the express condition that if it was not paid, the rights of the parties should terminate. The second note was
68 given on the day the first became due, and contained a similar stipulation. It seems to me that there was no inference from those transactions that there would be any further extension of time or waiver of the rights which the parties had expressly stipulated to in all the other agreements they had made. And the letter was written which clearly indicates that the company considered the rights of the parties at an end. Of course it suggested or requested that they enter into some further agreement, but it very clearly indicates, that so far as any then present rights were concerned, there were none. The only question in my mind about which I have any doubt, is the question whether the New York statute is applicable to the note. The plaintiff contends, as I understand it, that the giving of the note, with the cash payment, was a payment of the premium for the year. Of course, if it was a payment of the premium, then the statute would not apply to the provisions of the note, because payment of, or failure to pay the note would not be a payment of or failure to pay the premium. However that may be, it seems to me that the statute was not designed to apply to such a case, in any event; and if I had any doubt, it seems to me it ought to be resolved by the decision of the court of appeals of the State of New York in the 140th New York Reports.

Mr. O'BRIEN: I think this statute was not in force at that time, your honor.

The COURT: I so understood it.

Mr. O'BRIEN: This is the act of 1890.

69 Mr. CUTCHEON: It is an exact copy of the other one.

The COURT: I did not understand that there was any dispute on that point. Of course I have not examined into the statutes to see whether they are the same, but that statement was made by counsel, and I did not understand that it was disputed. And I find in the Texas case where the statute is alluded to as the statute of 1876 and 1877, to which the case in the 140th refers; I find that is the same as the statute pleaded in the complaint. That case seems to hold that the statute does not apply to a note given for a premium. The case in the Southwestern Reporter, in the Texas supreme court, it seems to me, does not cover the question, because there they held that the notice attempted to be given before the annual premium became due was insufficient; insufficient in its terms and insufficient in time, as I understand it; and that seems to be all that they decide, except that they go on to discuss the ques-

tion whether it was term insurance or not, but otherwise that case simply holds that no notice was given when the annual premium became due—no sufficient notice. So, I am of the opinion that the motion to dismiss must be granted.

Mr. O'BRIEN: The court will give us an exception and a stay of thirty days.

The COURT: Yes. The jury is discharged from further consideration of this case.

70 PLAINTIFF'S EXHIBIT "A."

New York Life Insurance Company, by this policy of insurance, agrees to pay twenty thousand dollars to Louisa, wife of the insured; or in the event of her prior death to the insured's executors, administrators, or assigns at the home office of the company in the city of New York, immediately upon receipt and approval of proofs of the death of William Banholzer of St. Paul in the county of Ramsey, State of Minnesota, (herein called the insured).

Age, 46.

And the company further agrees to pay twenty thousand dollars to the insured, or assigns, on the sixteenth day of September in the year nineteen hundred and fifteen, at the home office of the company in the city of New York, if the insured shall be living on that date; and this policy shall thereupon cease and determine.

And the company further agrees that this policy shall be incontestable after it has been in force one full year, if the premiums have been duly paid as provided herein.

This contract is made in consideration of the written application for this policy, which is hereby made a part of this contract, and in further consideration of the sum of eleven hundred and forty six dollars and — cents, to be paid in advance, and of the payment of a like sum on the sixteenth day of September in every year thereafter during the continuance of this policy, until twenty full years' premiums have been paid.

Annual premium $1,146.

71 The benefits and provisions placed by the company on the next page are conditions precedent and are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

Examined.

In witness whereof, the New York Life Insurance Company has, by its duly authorized officers, signed and delivered this contract this sixteenth day of September one thousand eight hundred and ninety-five.

JOHN A. McCALL, *President.*

C, endorsement accumulation.

CHAS. C. WHITNEY, *Secretary.*

Benefits and Provisions.

This policy participates in surplus as hereinafter provided, but no dividend shall be apportioned to it before the end of the accumulation period.

The accumulation period of this policy ends on the 16th day of September, in the year nineteen hundred and fifteen. The insured shall then be entitled if living, and if the premiums have been duly paid in full, to select and receive one of the three benefits following:

First. To discontinue this policy and receive its entire cash value as stated below, in cash; or

Second. To discontinue this policy and to receive its entire cash value as stated below, converted into an annuity; or

72 Third. To discontinue this policy and to receive its entire cash value, as stated below, converted into paid-up insurance payable at death only, without participation in surplus, subject to evidence of good health satisfactory to the company.

The company guarantees that the entire cash value of this policy at the end of accumulation period shall be twenty thousand dollars ($20,000), and in addition the dividend then apportioned by the company. This policy participates in surplus only as hereinbefore provided.

The company will make advances on loans on this policy within the month of grace allowed in payment of premiums, on application to the home office, at the fifth or any subsequent anniversary of the insurance under the terms of the company's loan agreement then in use, and the following conditions:

First. That premiums have been paid in full to the time when the loan is made, including the premiums for the entire insurance year then beginning.

Second. That the company will loan at the fifth or any subsequent anniversary up to the tenth, such amounts as the insured may desire, not exceeding in all $3,480; at the tenth or any subsequent anniversary up to the fifteenth, such amounts as the insured may desire, not exceeding in all $7,680; and at the fifteenth or any subsequent anniversary up to the twentieth, such amounts as the insured may desire, not exceeding in all $12,900. The amount of any loan shall include any previous loans then unpaid.

73 Third. That this policy shall be duly assigned to the company as collateral security for the loan, and deposited at the home office. A copy of the loan agreement will be furnished to the insured.

Fourth. That interest at the rate of five per — per annum shall be paid on all loans at the next subsequent anniversary of the insurance, and annually thereafter until the loans are paid off.

Fifth. That the loans shall be for such time as the insured may desire, not longer, however, than to the end of the accumulation period.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying any

premium, to waive any forfeiture, or bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office, unless otherwise agreed in writing, but may be made to agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agents. If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided.

74 A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, and the unpaid premium, with interest as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month.

This policy will be reinstated on written application therefor within six months after non-payment of any premium, subject to evidence of good health satisfactory to the company, and payment of premiums to date of reinstatement with interest at the rate of five per cent. per annum.

Proofs of death must be furnished to the company at the home office within one year after the death of the insured, which proof shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's forms in use at the time of the death of the insured. If it is found that the age of the insured was incorrectly stated in the application on which the policy was issued, the amount payable under this policy shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

75 Any indebtedness to the company, including any balance of the current year's premium remaining unpaid will be deducted in any settlement of this policy or of any benefit thereunder.

Any assignment of this policy must be made in duplicate, and both sent to the home office, one duplicate to be retained by the company and the other to be returned. The company has no responsibility for the validity of any assignment.

This policy cannot be forfeited after it shall have been in force three full years, as hereinafter provided.

First. If any premium subsequently due is not paid as hereinbefore provided, this policy will be continued for its full amount, payable only if the insured dies within the continued period, with a reduced amount payable only if the insured survives the continued period, as provided in the table below, subject to the condi-

tions of this policy, but without further payment of premiums, and without loans and participation in surplus; or

Second. If any premium subsequently due is not paid as hereinbefore provided, this policy will be endorsed for the reduced amount of paid-up insurance provided in the table below, if demand is made therefor with surrender of this policy within six months thereafter, subject to the conditions of this policy, but without further payment of premiums, and without loans and participation in surplus.

Here is inserted in the policy a copy of the insured's ap-
76 plication therefor, which after certain questions and answers, immaterial hereto, reads as follows:

I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, each of the above answers to be full, complete and true.

I agree, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, as follows: 1. That the foregoing "application," together with the "answers made to the medical examiner," in continuation of, and forming a part of the application, shall be consideration for, and the basis of the contract of the New York Life Insurance Company under any policy issued under this application; 2. That inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written answers referred to, no statements, promises or information made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company or in any manner affect its rights, unless such statements, promises or information be reduced to writing and presented to the officers of the company at the home office, in this application; 3. That in any distribution of surplus or apportionment of dividend, the principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy which may be issued
77 under this application, shall be and are hereby ratified and accepted; 4. That the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has actually been paid to, and accepted by, the company or its authorized agent during my lifetime and good health; 5. That no suit shall be brought against the company after two years from the time when the cause of action shall have arisen, nor after two years from the time of my death; 6. That the policy applied for shall be in the form now in use by the company, and that the contract contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company.

Dated at St. Paul, this 9th day of Sept., 1895.

Signature of the person applying for insurance.

(Write name in full.) WILLIAM BANHOLZER.

PLAINTIFF'S EXHIBIT "B."

New York Life Insurance Company, 346–348 Broadway, New York.

Cash, $286.

ST. PAUL, MINN., 10–6–'96.

Note 6 mo., dated 9–16–'96 due 3–16–'97 without grace.
Made by Wm. Banholzer.
78 Payable at Second national bank, St. Paul, Minn.
Received from the owner of policy No. 692,465 $286 in cash and his note at six months for $860 which continues said policy in force until the 16th day of Sept. 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by—

J. A. CAMPBELL, *Cashier.*

PLAINTIFF'S EXHIBIT "C."

Pol. 692,465. ST. PAUL, MINN., 9–16–1896.

Without grace six months after date I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second national bank, St. Paul, Minn., value received, with interest at the rate of 5 per cent. per annum.

This note is given in part payment of the premium due 9–16–'96 on the above policy, with the understanding that all claims as to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

No. 43205. Int. 21.50. $860.

WILLIAM BANHOLZER.

M'ch 16, '97.

79 PLAINTIFF'S EXHIBIT "D."

New York Life Insurance Company, 346–348 Broadway.

G. W. P. K. M.

NEW YORK, *May 26th*, 1897.

Mr. William Banholzer, 690 Stewart St., St. Paul, Minn.

DEAR SIR: We have received a report from our branch office, returning unpaid the note which was given by you to meet the payment of the overdue premium on your policy No. 692,465.

We regret very much that you did not see your way to meet this note at its maturity, as we are certain that nothing short of an apparent necessity or some misapprehension of fact, would compel you to give up your insurance with our company. You are no doubt aware that no other company issues policies which are more

liberal in their conditions or more satisfactory in their results, and we believe it would be very much against your own interest should you fail to do everything in your power to put this policy in force again.

Being a mutual company we are anxious to do everything possible for the good of the policy-holders, and if you will let us know just how much cash you can pay at present, we shall take your case under consideration, and you can rest assured that if it is at all possible to reinstate you on easy terms, we shall have the com-
80 pany do so. Any communication you may make will be treated with the utmost confidence, and we will look for an early reply in the enclosed stamped envelope.

Very truly yours, GEO. W. PERKINS,
3rd Vice-President.

(Enc.)
692,465.

PLAINTIFF'S EXHIBIT "E."

New York Life Insurance Company, 346–348 Broadway.

J. J. M. C. A. S. cc.

In your reply refer to file No. 88943.

Mr. F. G. B. Woodruff, 88 Court block, St. Paul, Minn.

DEAR SIR: We acknowledge receipt of your letter of the 18th inst., enclosing draft of the Second National Bank of St. Paul, Minn., for $690, on the Western National Bank of New York City, which draft you tender in settlement of the unpaid note of $639, and interest, which note was due May 16th, 1897, accepted in part settlement of the premium due September 16th, 1896, on policy No. 692,465, Banholzer. As policy No. 692,465, Banholzer, stands lapsed on the books of the company for non-payment of the note
81 described above, we return herewith the draft forwarded in your letter of above date.

We shall thank you for acknowledgment of this enclosure. When writing, please refer this letter by file number.

Very respectfully, HUGH S. THOMPSON,
Comptroller.

1 enc.

PLAINTIFF'S EXHIBIT "F."

New York Life Insurance Company, 346–348 Broadway.

H. H. B.

Re. No. 692,465—Banholzer.

NEW YORK, *Dec. 26th*, 1897.

Messrs. C. D. & Thos. O'Brien, 212 Globe bldg., St. Paul, Minn.

DEAR SIRS: In reply to your favor of Dec. 22nd would state that the company denies any liability whatever under the above-numbered policy.

Yours very truly, G. W. HUBBELL,
General Solicitor.

The foregoing case having been by me examined and found to conform to the truth, is hereby signed, sealed and allowed as and for the settled case of the above-entitled action.

HASCAL R. BRILL,
District Judge.

Dated April 22, 1898.

82 You will please take notice that the foregoing is hereby proposed as and for the settled case in the above-entitled action upon the plaintiff's motion for a new trial therein.

Yours truly, etc.,

C. D. & THOS. D. O'BRIEN,
Plaintiff's Attorneys, St. Paul, Minnesota.

Dated April 16th, 1898.

To Messrs. Flandrau, Squires & Cutcheon, defendant's attorneys, St. Paul, Minn.

It is stipulated that the within may be signed as *as* here formulated as the settled case herein, April 21, 1898.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

Endorsed: Filed April 22, 1898. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

83 LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant. } 71882.

You will please to take notice:

That on Saturday, the 30th day of April, A. D. 1898, at a special term of the above-entitled court then to be holden in the courthouse in the city of St. Paul, county of Ramsey, and State of Minnesota, at ten o'clock in the forenoon of that day. The above-named plaintiff will move the court to set aside the verdict heretofore rendered in the above-entitled action and for a new trial upon the grounds:

First. Because of errors of law occurring upon the trial, and excepted to by plaintiff; and

Second. Because said verdict is not supported by the evidence, and is contrary to law.

That said motion will be made upon the settled case heretofore made and filed herein, and upon all the files and records in said case.

Yours, &c., C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff, 212 *Globe Bldg., St. Paul., Minn.*

To Messrs. Flandrau, Squires & Cutcheon, attorney- for defendant, St. Paul, Minn.

84 Endorsed: Filed April 22, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

The motion for a new trial made on behalf of the defendant herein, together with the motion to set aside the verdict stated to have been heretofore rendered in the above-entitled action, came on to be heard before the undersigned, judge of said court above named, at a special term of said court, holden at the court-house in the city of St. Paul upon the 30th day of April, 1898; said motions being based upon the following grounds:

First. Because of errors of law occurring upon the trial and excepted to by the plaintiff.

Second. Because said verdict is not supported by the evidence and is contrary to law.

85 Messrs. C. D. & Thos. D. O'Brien appeared upon behalf of the plaintiff in support of said motions, and Messrs. Flandrau, Squires & Cutcheon and Francis B. Tiffany, Esq., appeared on behalf of the defendant in opposition to said motions.

Now, after hearing counsel and consideration of said motions and upon all the files and records of said cause, it is—

Ordered, that said motions be, and the same are in all things hereby denied.

HASCAL R. BRILL,
District Judge.

Dated St. Paul, April 30th, 1898.

Endorsed: Filed April 30, 1898. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

To Messrs. Flandrau, Squires & Cutcheon, attorneys for the above-named defendant, and E. G. Rogers, clerk of the said district court:

86 Please to take notice, that the above-named plaintiff, Louisa Banholzer, hereby appeals to the supreme court of the State of Minnesota, from the order of the district court entered

herein and filed in the office of the clerk of said court on the 30th day of April, 1898, in favor of the said defendant and against the said plaintiff, denying plaintiff's motion for a new trial of said cause.

Dated this 12th day of May, 1898.

C. D. & T. D. O'BRIEN,
Attorneys for Plaintiff.

Endorsed: Filed May 23rd, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

Undertaking to Stay Proceedings on Appeal from Order.

Whereas, an order was entered in the above-entitled action in the district court of the county of Ramsey on the 30th day of
87 April, 1898, denying the motion of said appellant for a new trial of said action, and whereas the said Louisa Banholzer feeling aggrieved thereby, desires to appeal therefrom to the supreme court of this State:

Now, therefore, we, Fred Banholzer and Sula Widman, do undertake and bind ourselves in the sum of two hundred and fifty dollars, that the said appellant Louisa Banholzer shall pay the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

FREDERICK BANHOLZER. [SEAL.]
SULA WIDMAN. [SEAL.]

Dated this 16th day of May, 1898.

Endorsed: Filed May 23, 1898. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

88 11366.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1898.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INS. CO., Respondent. } No. 103. Syllabus.

On September 16, 1895, the defendant issued a policy of insurance on the life of plaintiff's husband, of which she was the beneficiary, the premium being payable yearly in advance. It was provided in the policy that "if any premium is not paid on or before the day when due this policy shall become void and all pay-

ments previously made shall remain the property of the company; and also that the policy should be deemed a New York contract and be construed according to the laws of that State."

At that time there was and still is in force a statute of that State providing that no policy should be forfeited or lapsed by reason of non-payment, when due, of any premium, interest, or instalment, or any failure thereof, unless a prescribed notice is served on the insured at least fifteen and not more than forty-five days prior to the day when the same is payable.

When the second year's premium became due on Sept. 16th, 1896, the insured paid a part in cash and for the balance gave the defendant his note at six months, which expressly stated that it was given in part payment of the premium, with the understanding that all claims to further insurance and all benefits whatever which full payment of the premium in cash would have secured should be immediately void and forfeited if the note was not paid at maturity; and as a part of the same transaction the defendant gave the insured a receipt for the note which stated that the policy is in force until September 16th, 1897, in accordance with its terms and conditions, provided the above note is paid at maturity.

At the maturity of this note on March 16, 1897, the insured paid a further sum in cash on the premium and for the balance
89 still remaining gave his note at sixty days, containing the same terms and conditions as the first note, and received a similar receipt therefor. This note was not paid at maturity and the insured never tendered payment until June 18th, when the defendant declined to accept it. Prior to the time the annual premium became due, on September, 1896, the defendant seasonably gave the notice required by the New York statute, but it did not give any such notice prior to the maturity of either of the notes referred to. On May 26th, 1897, the defendant, by letter, referring to the failure of the insured to pay his note, which had matured on the 16th of the month, suggested to the insured the expediency of his taking steps to have the policy put in force again and to have himself reinstated, and expressed its willingness to do so on easy terms. The defendant has never returned the note of the insured, which fell due on May 16th, but it has never attempted to enforce its payment or asserted any rights under it, nor has its return ever been demanded.

Held, construing the contract according to the laws of New York, as interpreted by the highest court of that State, the "premium notice" required by the statute of that State did not apply to the notes; that having given the notice prior to the time the annual premium became payable, in September, 1896, the defendant was not required to give any other notice; also that upon the failure of the insured to pay his note at maturity the policy was forfeited and became absolutely void, unless such ground of forfeiture was waived by the defendant, either by its prior course of conduct or by its subsequent conduct. No declaration of forfeiture was necessary.

Also that, upon the facts, there was no such waiver.

Order affirmed.

90 11366.

STATE OF MINNESOTA:

Supreme *April*, October Term, A. D. 1898.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INS. CO., Respondent. } No. 103. Opinion.

On September 16th, 1895, the defendant issued a policy of insurance on the life of William Banholzer for twenty thousand dollars, payable in the alternative either to himself in the year 1915, or, in case of his death prior to that time, to his wife, Louisa Banholzer, the plaintiff and appellant herein. The consideration for the policy is the sum of $1,146.00, to be paid in advance, and the payment of a like sum on the 16th day of every September of each year thereafter during the continuance of the policy until full twenty years' premiums were paid.

Among the conditions contained in the policy and made a part of the contract of insurance, the following are necessary to be considered upon this appeal:

"If any premium is not paid on or before the day when due this policy shall become void and all payments previously made shall remain the property of the company, except as hereinafter provided."

"A grace of one month may be allowed in payment of subsequent premiums after this policy shall have been in force three months subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force and the unpaid premium with interest is or remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month."

91 The first premium was paid in advance, but when the second became due, and during the one month's grace allowed for its payment, Mr. Banholzer paid $286.00 in cash, and for the balance gave a note in terms as follows:

"ST. PAUL, MINN., 9–16, '96.

Without grace, six months after date, I promise to pay to the New York Life Insurance Company eight hundred and sixty dollars at the Second national bank, St. Paul, Minn., value received, with interest at the rate of five per cent. per annum. This note is given in part payment of the premium due 9–16–'96 on the above policy, with the understanding that all claims to further insurance, all benefits whatever which full payment in cash of said premium would have secured, shall be immediately void and forfeited to the New York Life Insurance Co. if this note is not paid at maturity, except as otherwise provided in the policy itself.

WM. BANHOLZER."

Contemporaneously with the execution of the foregoing note and as a part of the same transaction, the respondent gave Mr. Banholzer the following receipt:

"ST. PAUL, MINN., 10–6, '96.

Note six months after date, 9–16, '96, due 3–16, '97, without grace, made by William Banholzer, payable at Second National Bank of St. Paul, Minn., received from the owner of policy No. 692,465 $286 in cash and his note at six months for $860, which said policy is in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity and this receipt signed by—

J. A. CAMPBELL, *Cashier.*"

At the maturity of the note it was delivered up to Mr. Banholzer, who then paid $241.50 in cash and gave a new note for $639
92 in terms similar to the preceding note, except that it was payable in sixty days from date. This note was not paid.

Mr. Banholzer was taken sick on the 28th of May, 1897, of a fever, which continued from that time, with intervals of delirium, until the 5th of July following, when he died, and about two hours after he "had laid down," as stated by Mrs. Banholzer at the trial in the court below, the following letter came:

"New York Life Insurance Company.

NEW YORK, *May* 26, '97.

Mr. Wm. Banholzer, St. Paul, Minn.

DEAR SIR: We have received a report from our branch office returning, unpaid, the note which was given by you to meet the payment of the overdue premium on your policy, No. 692,465. We regret very much that you did not see your way to meet this note at its maturity, as we are certain that nothing less than an apparent necessity or some misapprehension of fact would compel you to give up your insurance with our company.

You are no doubt aware that no other company issues policies which are more liberal in their conditions or more satisfactory in their results, and we believe it would be very much against your own interest should you fail to do everything in your power to put this policy in force again. Being a mutual company, we are anxious to do everything possible for the good of our policy-holders, and if you will let us know how much cash you can pay at present we will take your case under consideration, and you can rest assured that if it is at all possible to reinstate you on easy terms we shall have the company do so. Any communication you may make will be treated with the utmost confidence, and we will look for an
93 early reply in the enclosed stamped envelope.

Very truly yours, GEO. W. PERKINS,
3rd Vice-President.

On June 18th, 1897, through one F. G. B Woodruff, his attorney, Mr. Banholzer sent a draft for $690, the unpaid balance, with in-

terest, of the premium due 9-16-'96 to the home office of the respondent. This draft was returned with the following letter:

"New York Life Insurance Company, 346-348 Broadway.

NEW YORK, *June* 22, 1897.

Mr. F. G. B. Woodruff, St. Paul, Minn.

DEAR SIR: We acknowledge receipt of your letter of the 18th inst., enclosing draft of the Second National Bank of St. Paul, Minn., for $690, on the Western National Bank of New York City; which draft you tender in settlement of the unpaid note of $639, with interest; which note was due May 16th, 1897, accepted in part settlement of the premium due Sept. 16th, 1896, on policy No. 692,465, Banholzer. As policy No. 692,465, Banholzer, stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number.

Very respectfully, HUGH S. THOMPSON,
Comptroller."

Mr. Banholzer's application for insurance, which is made a part of the consideration for the policy and is signed by Mr. Banholzer, provides that the contract of insurance contained in the
94 policy shall be construed according to the laws of the State of New York, the place of the contract being agreed to be the home office of the respondent, which is at the city of New York. At the time of the execution of this contract of insurance there was in force a statute of the State of New York which provided that "No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums or unless the same is a term insurance company for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or instalment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, or instalment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last-known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or instalment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all

payments thereon will become forfeited and void except as the rights of a surrender-value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made in the time limited therefor, it shall be taken to be in full compli-
95 ance of the requirements of the policy in respect to the time of payment and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

The notice required to be given by the New York statute above mentioned was duly given by the defendant more than fifteen and less than forty-five days prior to September 16, 1896, but no such notice was given within the corresponding period prior to the maturity of either the note dated Sept. 16, 1896, or the note dated March 16, 1897, although the ordinary bank notice was given prior to the maturity of each note.

The defendant has never returned Banholzer's note of May 16, 1897, but it does not appear that a return has ever been demanded or that the defendant has ever attempted to enforce it or asserted any rights under it, and in its answer it alleges that it retains it merely as evidence of the contract between the parties and for its own protection.

Proper proofs of death were seasonably served upon the respondent at the home office in New York. Upon this state of the evidence the action was dismissed at the close of plaintiff's testimony, a motion for a new trial made and denied, and from the order denying plaintiff's motion for a new trial this appeal is taken.

MITCHELL, *J.* (after stating the facts as above):

If any regard is to be given to the plain and unambiguous language of the parties, non-payment of the premium according to the terms of the policy would *ipso facto* render the policy void unless there had been some act of waiver on part of the company. No declaration of forfeiture would be required unless rendered necessary by some prior course of dealing. Unless we regard certain *dicta* in Ins. Co. v. French, 30 Ohio St., 240, as an exception,
96 the authorities seem to be unanimous to this effect in construing policies like the present.

This is equally true under the subsequent modifications of the contract on September 16th, 1896, and March 16th, 1897, when the assured gave his promissory note for part of the second year's premium. In each instance it was stipulated in the note itself that "This note is given in part payment of the premium due September 16th, 1896, on the above policy, with the understanding that all claims to further insurance, all benefits whatever which full payments in cash of said premium would have secured, shall be immediately void and forfeited to the New York Life Insurance Company if this note is not paid at maturity, except as otherwise provided in the policy itself." (This exception refers to the "non-forfeitable" provisions of the policy, which, in this case, had not taken effect), and the contemporaneous receipt, which formed part of the con-

tract, says "which said policy is in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity."

If there would otherwise be any doubt as to the construction of the contract of the parties it is conclusively resolved in this case in favor of the defendant by the decision of the court of appeals in Holly *v.* Metropolitan Life Ins. Co., 105 N. Y., 437.

II. There was no waiver on part of the defendant of this condition of the policy, either by a prior course of dealing or by its subsequent conduct. The fact that the defendant had granted the insured two extensions of time for the payment of part of the premium which fell due September 16, 1896, gave him no right to assume that the company would grant the third extension on the same premium, and, certainly, it gave him no right to assume that it would grant him a further extension on different terms or waive a forfeiture already incurred. In the transactions of Sep-
97 tember 16, 1896, and March 16, 1897, the insured paid part of the premium in cash and gave his note for the balance while his policy was still in force, but when the last note became due on May 16, 1897, the insured did absolutely nothing until June 18, 1897, thirty-three days after his policy was forfeited, unless kept alive by the failure of the company to give another "premium notice," in accordance with the provisions of the statute of New York. There is nothing in the semblance of a waiver in the company's letter of May 26th to the insured.

A perusal of that letter will show that it assumes that the policy was already forfeited, and has reference solely to bringing about some arrangement by which the insured might be reinstated and the policy put in force again on terms to be thereafter mutually agreed upon. Nor under the circumstances do we see anything in the mere retention of Banholzer's note of March 16, 1897, which tended to prove a waiver of a prior forfeiture of the policy, whether the note fell with the policy or whether it remained in force by virtue of the provision that if the policy became void by reason of the non-payment of any premium "all payments previously made shall remain the property of the company."

III. The next and last contention of plaintiff is that the "premium notice" required by the statute of New York applied to the note which fell due May 16, 1897, and that the policy could not become lapsed or forfeited for the non-payment of the note without the company's giving the prescribed notice of not less than fifteen nor more than forty-five days prior to the day when the note, by its terms, became payable, notwithstanding the fact that the defendant had already given such notice before the premium became payable the preceding September. Even if the question was *res nova*, I am clearly of the opinion that, upon the facts, this statutory provision has no application to this note. But as my brethren do not agree with
98 me in this, it would be useless for me to enter into any discussion of the reasons for my opinion. The parties mutually agreed that this should be deemed a New York contract

and construed according to the laws of that State. The decisions of the highest court of that State as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties. In Conway *v.* Insurance Co., 140 N. Y., 79, upon a state of facts and under a statute which in our opinion are in no way distinguishable from those involved in the present case, the court of appeals held that the notice required by statute did not apply to the notes; that the company having served that notice before the premium became due, no further notice was required. Counsel for the plaintiff do not claim that the facts of the two cases are in any respect distinguishable, but they seek to draw a distinction between the language of the statute considered in the "Conway case" and the statute applicable to the present case. The statute under consideration in the former was Laws of N. Y., 1876, ch. 341, as amended by Laws 1877, ch. 321; the statute applicable to the present case is Laws of N. Y., 1892, ch. 690, sec. 92. This last act appears to be a compilation and revision of all the insurance laws of the State, and sec. 92 but an embodiment (with certain amendments) into the act of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts and are unable to discover any difference between them that at all affects the question now under consideration.

Even if the "one month's grace" allowed by the policy for the payment of the premium was applicable to the notes (which I do not think is so), that fact would not aid the plaintiff, for the insured did not offer to pay the last note until thirty-three days after it matured.

Order affirmed.

MITCHELL, *J.*

99 [Endorsed:] No. 11366. State of Minnesota, supreme court. Louisa Banholzer, appellant, *vs.* New York Life Ins. Co., respondent. Copy of opinion and syllabus. Original. Filed December 2, 1899. D. F. Reese, clerk. October term, A. D. 1898. Mitchell, J.

100 11366.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1898.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INS. CO., Respondent.

No. 103. Opinion on Reargument.

Upon the original hearing of this cause counsel for the plaintiff contended in his oral argument that the statute of New York applicable to this case was materially different from that considered in Conway *v.* Life Ins. Co., 140 N. Y., 79, but did not suggest that that case and the one at bar were distinguishable in their facts. We therefore inadvertently assumed that he did not claim any such distinction; but upon our attention being subsequently called to

the matter we discovered that we were in error, and that in his printed brief he did claim that the two cases were distinguishable, and for that reason we granted a reargument of the single question whether the premium notice required by the statute of New York was applicable to the notes which the insured gave for part of the premium which became due in September, 1896.

Upon examination we are satisfied that the two cases are distinguishable in their facts, inasmuch as in the "Conway case" the court in the first part of the opinion held that the agent had no authority to grant an extension of time for the payment of the premium, and hence that the deceased was uninsured from the time that he defaulted in the payment of the premium according to the terms of the policy; hence the question of notice might have been disposed of on that ground; but we are now equally well satisfied that in what the court said on the subject of notice in the last
101 part of the opinion it intended to and did decide the question upon the assumption that the company was bound by the agent's acceptance of a time note for the premium. This is made quite clear to our minds from an examination of the record and briefs in the case, copies of which have been furnished us by counsel for the defendant.

While this shows the views of the court of appeals upon the construction of the statute, the doubt in our minds is whether, under the circumstances, it is a decision of the question which is binding on us. See Carroll *v.* Carroll, 16 How. (U. S.), 275-286 and 287.

We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra* the notice required by it was not applicable to the notes given by Banholzer for part of the September premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to; and while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was not within the legislative intent.

The premiums on life-insurance policies are always payable at stated periods specified in the policy once for all during its life. They are usually payable yearly, sometimes every six months, and occasionally quarter-yearly. It seems to us that it was these periodical due days, as fixed in the policy itself, which the legislature had in mind and to which the statute refers, and not to an extension of time for the payment of a particular premium after it has
102 become due according to the terms of the policy. These extensions are usually and probably always granted at the instance and for the accommodation of the insured. They are always the result of a special and express agreement, which brings

the whole matter presently to the mind of the insured. They are necessarily for a comparatively short time.

They are therefore not within the mischief of the statute; at least, not to any considerable extent. The language of the statute is not very apt, if it was designed to include them, and in practice it would often be impracticable, if not impossible, to apply its provisions to such temporary and special extensions. To do so would often produce some very unreasonable results. For example, if the extension was for only fifteen days the insurer would have to give the insured notice of the date when the extension would expire on the very day it was granted. Every extension, although in terms only for one day or for five days, would in effect amount to an extension for at least fifteen days. It can make no difference in principle whether the extension was for two days or two months, or whether a time note was taken for the overdue premium or the extension granted in some other way. For these reasons the opinion heretofore filed is adhered to.

MITCHELL, *J.*

103 I cannot concur in the foregoing opinion. What was said in the Conway case as to the question here involved is mere dicta. By every sound rule of interpretation the letter of the statute of New York applies to a case where the time of payment of an instalment of the premium has been extended, and clearly such a case is within the spirit of the statute, and notice should be given of the time when the instalment as thus extended will fall due. The object of the statute like that of the usury law is to protect people from themselves by preventing them from making foolish contracts. The policy of this law is the same as that of the law which allows a specified length of time in which to redeem from a real-estate or chattel mortgage, and prevents the forfeiture of property rights without notice or warning which must be given a certain length of time in advance. It is well settled that the parties for whose benefit those statutes are passed are not allowed to waive the rights given them by the statute, and the courts will not listen to any subterfuge by which the statute is attempted to be evaded.

But, according to the decision of the majority, the statute here in question may be evaded merely by extending the time of payment a single day or a single hour. Surely, extending the time of payment of the instalment of premium after giving the statutory notice will waive the notice, and the effect will be the same as if the notice had never been given. Then the fact that notice was given in this case before the time of payment was extended is wholly immaterial.

There is nothing in the argument that the statute should not be held to apply, because if it did an extension for one or two days would amount to an extension for fifteen days. The very purpose of the statute was to prevent people from making contracts which they might have made before its passage, and the law should not be brushed aside merely because it accomplishes this purpose.

104 Suppose a law to prevent the forfeiture of mortgaged chattels on the due day provided that a chattel mortgage should be foreclosed by giving fifteen days' notice, to expire on the day the mortgage debt fell due. Could it be held that the law did not apply merely because there *was* only ten days from the time of the execution of the mortgage to the day the debt fell due? Again, could such a law be evaded by extending the time of payment?

In my opinion the statute applied, and the order appealed from should be reversed and a new trial granted.

CANTY, *J.*

105 [Endorsed:] No. 11366. State of Minnesota, supreme court. Louisa Banholzer, appellant, *vs.* N. Y. Life Ins. Co., respondent. Opinion on reargument. Filed January 30, 1899. D. F. Reese, clerk. October term, A. D. 1898. Mitchell, J.

106 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1898.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } No. 103

Pursuant to an order of court duly made and entered in this cause on the third day of February, A. D. 1899, it is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said Louisa Banholzer, appellant herein, the sum and amount of eighty-nine and $\frac{75}{100}$ dollars ($89.75), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 3rd day of February, 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	52.00
Clerk's fees, supreme court	12.50
Filing mandate	
Affidavits and acknowledgments	.25
Postage	
Copying returns for printer	
	$89.75

107 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this third day of February, A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE, *Clerk.*

[Endorsed:] 11366. State of Minnesota, supreme court. Transcript of judgment. Filed February 3, A. D. 1899. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 349, W Book.

108 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1898.

LOUISA BANHOLZER, Appellant,	No. 103. Appeal from District Court, Second Judicial District, County of Ramsey.
vs.	
NEW YORK LIFE INSURANCE COMPANY, Respondent.	

This cause having been duly argued and submitted at the general October term of this court, A. D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered February 3, A. D. 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

109 [Endorsed:] No. 11366. State of Minnesota, supreme court. Copy of order for judgment. Filed Feb. 3, A. D. 1899. D. F. Reese, clerk. Entered on page —.

110 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1898.

TUESDAY MORNING, 9.30 o'CLOCK—*November* 15, *A. D.* 1898.

Court convened pursuant to adjournment, all the justices being present.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } Cal. No., 103; Reg. No., 11366.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

111 [Endorsed:] 11366. State of Minnesota, supreme court. Copy of minutes of argument. Filed Feb. 3, A. D. 1899. D. F. Reese, clerk.

112 [Endorsed:] No. 11366. State of Minnesota, supreme court. Louisa Banholzer, appellant, against New York Life Ins. Co., respondent. Judgment-roll. Filed February 3, 1899. D. F. Reese, clerk.

113 In the Supreme Court of the State of Minnesota.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Corporation, Respondent.

It is hereby stipulated by and between the respective counsel for the parties to the above-entitled action that at once upon the filing of this stipulation judgment may be entered therein in the supreme court of the State of Minnesota in accordance with the order of the court, in affirmance of the judgment of the district court in and for the county of Ramsey therein, and that said respondent shall have judgment for its costs in said supreme court in the sum of ten dollars ($10.00), and all provisions of statute and rules of court contrary or conflicting herewith are in all respects waived.

Dated St. Paul, Minnesota, April 10th, A. D. 1899.

C. D. & THOS. D. O'BRIEN,
Attorneys for Appellant.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Respondent.

114 [Endorsed:] 11366. In the supreme court of the State of Minnesota. Louisa Banholzer, appellant, *vs.* The New York Life Insurance Company, a corporation, respondent. Stipulation for judgment. C. D. & Thos. D. O'Brien, attorneys for appellant, #212 Globe bldg., St. Paul, Minn.

Endorsed: Filed Apr. 10, 1899. Darius F. Reese, clerk.

115 In the Court of Appeals of the State of New York.

ANNA V. CONWAY, as Administratrix, etc., of William F. Conway, Deceased, Plaintiff, Respondent,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Defendant, Appellant.

Return.

Smith & Wellington, attorneys for respondent.
Hale & Bulkeley, attorneys for appellant.

116 Supreme Court.

Supreme Court, County of Rensselaer.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased, Plaintiff,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated this third day of January, 1893.

SMITH & WELLINGTON,
Plaintiff's Attorneys.

Office and post-office address, 16 First street, Troy, N. Y.

117 Supreme Court, Rensselaer County.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased, Plaintiff,
ag'st
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Defendant.

The complaint shows upon information and belief:

The defendant is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, doing business within the State of New York.

Heretofore, to wit, May 8th, 1892, one William F. Conway died

at the city of Troy, county of Rensselaer, New York, intestate, leaving a widow and next of kin.

May 19th, 1892, said widow, the plaintiff herein, was duly appointed administratrix of the goods, chattels and credits of said William F. Conway, and letters of administration were duly issued to her then and there out of the surrogate's court of Rensselaer county, and she thereupon entered upon the discharge of her duties as such administratrix.

Heretofore, to wit, October 24th, 1887, the defendant, for a good and valuable consideration, issued its policy of life insurance upon the life of said William F. Conway, a copy of which policy is annexed hereto, marked "A," and is made a part of this complaint. The annual premiums thereon were paid each year on the 24th day of October, 1891.

The defendant's general agents and managers within the State of New York were and are the firm known as M. V. B. Bull & Company, of Albany, N. Y.

118 On the 24th of October, 1891, said William F. Conway, for the annual premium on said policy, gave to said general agents of the defendants his promissory note in writing, for two hundred two and 35/100 dollars, payable six months from that date. Said agents accepted said note and thereby extended the time of the payment of the premium due October 24th, 1891, six months.

The defendant, for a good and valuable consideration, extended said time of payment of said premium for said six months, and the said deceased, relying upon said extension, did not pay said premium on the 24th day of October, 1891, and the defendant is estopped from claiming a forfeiture of said policy by reason of the non-payment in cash of said premium on the 24th of October, 1891.

On the 19th day of April, 1892, said general agents and managers of the defendant wrote said deceased a letter as follows:

"In reply to your favor of the 18th, your renewal has remained unpaid since October last, pending the maturity of your note, and we do not feel at liberty to accept a note extending the time any further. We hope, if it is possible for you to do so, you will meet the note at maturity. If you cannot do this, by way of accommodating you as far as possible, we will, if you so request, recall your note from the bank where it now lies and hold your renewal at this office as long as it may be possible to do so. You will understand, of course, that we are likely any day to be required to return it to the home office for cancellation, which we hope will not be necessary however."

Said deceased relied upon said letter and did not pay said note at maturity.

The defendant by said letter is estopped from claiming that said policy was forfeited by the non-payment of said note at maturity.

Before the premium receipt, or renewal as it is termed in
119 said letter, was returned to the home office of said defendant, said deceased died. After his death the plaintiff through a representative offered to pay said note, but said offer was declined.

Heretofore, to wit, May 30th, 1892, proofs of death required by said policy were served upon the defendant.

The defendant, with full knowledge of all the facts hereinbefore stated, after the death of said William F. Conway, required the plaintiff at expense and trouble to her to prepare and verify said proofs of death and to procure county clerk's certificates at an expense to her, this plaintiff. The defendant thereby intended to and did waive any invalidity of said policy.

The defendant never served the notice required by the statute, within the time required by the statute, that said policy would lapse or be forfeited in case of the failure of the assured to pay the premium due by the terms of the note April 27th, 1892, or by the terms of said letter within a reasonable time thereafter; nor, as the plaintiff is informed and believes, did the defendant serve any such notice respecting the premium originally due October 24th, 1891.

Said general agents and managers had at the times hereinbefore mentioned power and authority to extend the time of the payment of said premium due originally October 24th, 1891, and said general agents and managers had apparent power and authority to extend said time, which was known to the defendant, and upon which said deceased relied. The defendant is thereby estopped from claiming that said agents and managers had not said authority.

The plaintiff, recognizing the validity of the note held by the defendant or its agents against said deceased, hereby consents that it may be offsetted against the sum of five thousand dollars claimed to be due from the defendant to the plaintiff. Before the
120 commencement of this action payment of said policy was demanded of the defendant, which was refused.

Wherefore, the plaintiff demands judgment against the defendant for the sum of five thousand dollars, with interest from June 30th, 1892, less the sum of two hundred two and $\frac{35}{100}$ dollars, with interest from April 27th, 1892, besides the costs of this action.

SMITH & WELLINGTON,
Plaintiff's Attorneys, 16 First Street, Troy, N. Y.

RENSSELAER COUNTY, *ss:*

Anna V. Conway, being duly sworn, says she is the plaintiff in the above-entitled action; the foregoing complaint is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

ANNA V. CONWAY.

Sworn to before me this 3rd day of January, 1893.

ALEX. B. KING, JR.,
Notary Public, Rens. Co.

"A."

Number 110,890. Amount, $5,000.

The Phœnix Mutual Life Insurance Company, of Hartford, Conn., In consideration of the application for this policy, and of the statements made therein, and of the sum of two hundred and thirty-nine dollars and thirty-five cents, to be paid to it annually on or before the 24th day of October in every year during the con-
121 tinuance of this policy, for the term of twenty years from the date hereof, does hereby insure the life of William F. Conway (the insured), of Troy, in the county of Rensselaer, State of New York, for the term of twenty years, in the sum of five thousand dollars, to be paid at the office of this company, in Hartford, Connecticut, to his legal representatives or assigns (the assured), within thirty days after satisfactory proof, at its said office, of the death of the said insured; or to said insured, his legal representatives or assigns, on the 24th day of October, 1907, in case the said insured shall be living at that date; this contract in either case being in full force, and any indebtedness of the insured or assured to this company being first deducted therefrom.

This policy is issued and accepted upon the following express conditions and agreements:

That if the death of the said insured shall at any time occur while visiting or residing in any part of the western hemisphere lying south of the thirty-second parallel of north latitude (excepting in the United States from the first day of November in each year to the first day of July next following), or of the eastern hemisphere south of the forty-second parallel of north latitude, or east of the fortieth meridian of longitude east from Greenwich, or while engaged as an employé in any capacity upon any vessel or railroad, or in any military or naval service (the militia when not in actual service excepted), without the written consent of this company previously given, or in case of the death of the said insured by self-destruction (except upon proof that the same is the result of disease or of accident occurring without the voluntary act of the insured), or from the violation of law or the use of intoxicating liquors by the said insured, then, in either of the foregoing cases, or in case of any untrue statements or suppression of facts in the application for this policy, this company shall only be liable under this policy
122 for the amount of the paid-up insurance to which the owner of this policy would, at the date of the death of the said insured, be entitled, according to the provisions hereinafter set forth.

That all permits for residence, travel, or occupation, which may be granted, and all other agreements, to be binding on this company, must be in writing and signed by its president or secretary, and that no agent or other person can alter, modify, or waive any of the terms or conditions of this policy.

That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the insured, and that if any subsequent premium hereon be not paid when due, and a separate receipt signed by the president or secretary of this com-

pany, in each case given therefor, then this policy shall cease; but when after three or more full years' premiums shall have been paid hereon, this policy shall cease for non-payment of any premium when due, then and thereafter this company shall be liable under this policy for a sum of non-participating paid-up insurance which shall be equal to as many twentieths of the amount of this policy as there shall have been paid full years' premium hereon, payable as above, at death, or at the date provided for the maturity of this policy, and subject to any indebtedness of the insured or assured to the company.

That any claim under this policy shall be presented in writing to the company, at its home office in Hartford, Conn., and shall contain full answers under oath to the questions in the company's blanks; and no suit shall be brought against the company, under this policy, after two years from the death of the insured, or expiration of the term of this insurance.

In witness whereof, the Phœnix Mutual Life Insurance
123 Company has, by its president and secretary, signed and delivered this contract in the city of Hartford, Conn., this 24th day of October, 1887.

A. C. GOODMAN, *President.*

J. M. HOLCOMBE, *Secretary.*

Said policy is endorsed as follows:

Policy No. 110,890.

Phœnix Mutual Life Insurance Company, Hartford, Conn.

Payable to William F. Conway, on the 24th day of October, 1907, or to his legal representatives in case of previous death of insured, $5,000.

Annual premium for twenty years, $239.35.

Date, October 24th, 1887.

Proofs of Death Required.

Blank forms for furnishing proofs of death may be obtained upon application to the company or any of its agents.

Supreme Court, Rensselaer County.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

The above-named defendant, answering the complaint of the plaintiff in the above entitled action,

1. Admits that it is a corporation, as alleged in said com-
124 plaint, and admits upon information and belief, that William F. Conway died leaving a widow and next of kin, at the time alleged in the said complaint, at the city of Troy.

2. As to whether the said William F. Conway died intestate, and as to whether the plaintiff was appointed administratrix as alleged in said complaint, this defendant denies any knowledge or information sufficient to form a belief.

3. Defendant admits that on the 24th day of October, 1887, it for a good and valuable consideration issued its policy of life insurance upon the life of the said William F. Conway, a copy of which is annexed to said complaint, marked A, and that the annual premiums thereon were paid each year prior to the 24th day of October, 1891.

4. Defendant admits that M. V. B. Bull & Co., of Albany, N. Y., were at the times alleged in the said complaint, general agents for the defendant within the State of New York.

5. Defendant, further answering, admits upon information and belief, that on or about the 24th day of October, 1891, the said William F. Conway gave to the said M. V. B. Bull & Co. his promissory note in writing, of which the following is a copy:

"$202.35. TROY, *Oct. 24th*, 1891.

"Six months after date, I promise to pay to the order of M. V. B. Bull & Co., two hundred two $\frac{35}{100}$ dollars, at Manufacturers' nat. bank, with interest, value received.

"W. F. CONWAY."

But defendant says, upon information and belief, that said note was not given to said M. V. B. Bull & Co., as agents of defendant, and that said note was never owned or held by defendant; and defendant alleges upon information and belief that said note has never been paid.

6. Defendant, further answering, admits upon information and belief, that on or about the 19th day of April, 1892, the said
125 M. V. B. Bull & Co. wrote to the said assured, William F. Conway, a letter, a copy of the substance of which is set forth in the said complaint.

Defendant further says upon information and belief, that the said letter written by said M. V. B. Bull & Co. was so written in answer to a letter written by the said assured, of which the following is a copy:

"TROY, *April* 18, 1892.

"Mr. Bull.

"DEAR SIR: You have a note of mine due on the 27th, which I find I will be unable to pay. I would like to have it renewed for three months, and feel I will be able to meet it then. I will send you check for interest as soon as I hear from you.

"Yours respt., WM. F. CONWAY,

"469 *River Street.*"

7. And defendant, further answering, admits upon information and belief, that before the premium receipt or renewal of the said policy had been returned by said M. V. B. Bull & Co. to the home office of the defendant, and while the same was in the possession of

said M. V. B. Bull & Co., the said William F. Conway died, and that after his death, a person claiming to be a representative of the said William F. Conway, deceased, verbally offered to the said M. V. B. Bull & Co. to pay the said note, but that the said offer was not accepted. And defendant further alleges upon information and belief, that said offer was not made until many days after the said premium receipt or renewal had been returned by said M. V. B. Bull & Co. to the home office of defendant, and that said M. V. B. Bull & Co. make no claim against the plaintiff or against the estate of
126 said William F. Conway upon said note, but are ready and willing to surrender the same to plaintiff.

8. And defendant, further answering, admits that on or about the 30th day of May, 1892, proofs of death, as required by the said policy, were served upon the defendant.

9. And this defendant, further answering, admits that the defendant never served any notice upon the said assured in regard to the lapse or forfeiture of the said policy, except the notice, a copy of which is hereinafter set forth.

10. Defendant, further answering, admits that before the commencement of this action payment of the said policy was demanded of the defendant, and that defendant refused to pay the entire amount thus demanded, or any amount greater than the sum for which it is liable under said policy as hereinafter admitted.

11. And this defendant, further answering, denies each and every allegation in the said complaint contained, not hereinbefore admitted or denied.

12. And this defendant, further answering, says that on the 31st day of August, 1891, which was at least thirty and not more than sixty days prior to the day when the premium of October 24, 1891, became due, this defendant served upon the said William F. Conway a notice, partly written and partly printed, by causing the same to be duly addressed and mailed to the said William F. Conway, the person whose life was insured by the said policy, of which said notice the following is a copy:

"The Phœnix Mutual Life Insurance Co.

"HARTFORD, CONN., 8–31–1891.

"The premium on policy No. 110,890 will become due
127 October 24th, 1891, and, if not paid, the policy and all payments thereon will become forfeited and void (except as otherwise provided in the policy).

"CHARLES H. LAWRENCE, *Secretary.*

"The above notice is sent as required by chapter 341, 1876, and 321, 1877, of the Laws of New York. It is not to replace the usual itemized notice (which is intended to be sent in due course, without responsibility for omission or miscarriage) nor to prevent payment through authorized agents."

That on the said 24th day of October, 1891, the annual premium upon said policy became due by the terms of the said policy, and

that the said assured, William F. Conway, omitted and neglected to pay the same, and that the same has never been paid to this defendant or to any agent or officer thereof, nor any separate receipt signed by the president and secretary of the company given therefor, and that by reason of such omission, by the terms of the said policy, the same ceased and came to an end, and the rights of the said assured and his representative thereunder were forfeited and became void, except that under the said policy, three or more full years' premiums having been paid thereon, this defendant became liable upon the death of the said assured for a sum equal to as many twentieths of the amount of the policy as there had been paid full years' premiums thereon, subject to the indebtedness of the said assured to the company, and that under the said policy, four full years' premiums having been paid thereon, the defendant became liable within thirty days after proof of the death of the said William F. Conway, to pay to his representative the sum of one thousand dollars, which amount this defendant has, since the service of the proofs of the death of said William F. Conway upon this defendant, always been ready and has offered to pay, and hereby offers to pay to the plaintiff. But this defendant denies that
128 it is liable to the plaintiff for any further or greater sum than the said sum of one thousand dollars, with interest thereon from the 29th day of June, 1892.

13. And for further answer, this defendant says that it never made, authorized or ratified any extension of the time for the payment of the said premium due October 24th, 1891, or waived the forfeiture of said policy caused by the omission of said assured to pay the premium which fell due as aforesaid on the 24th day of October, 1891.

14. And defendant further says, upon information and belief, that upon the payment of each of the annual premiums which became due prior to October 24th, 1891, upon said policy, a renewal receipt was given by defendant or its agents to the said assured, which contained a clause of which the following is a copy:

"By the terms of the policy, if the premium be not paid on or before the day when due, this policy will be forfeited, and no agent is authorized in any case to waive or postpone payment of premium, or to accept it after the date at which it falls due, without special permission from the president or secretary of the company."

And this defendant says that no permission was given by the president or secretary of the said company to waive or postpone the payment of the premium which became due on the said policy on the 24th day of October, 1891.

HALE & BULKELEY,
Attorneys for Defendant, 25 North Pearl Street, Albany, N. Y.

STATE OF CONNECTICUT, }
County of Hartford, } *ss:*

Charles H. Lawrence, being duly sworn, deposes and says
129 that he is the secretary of The Phœnix Mutual Life Insurance Company, the defendant in this action; that he has read the

foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES H. LAWRENCE.

Sworn to before me this 13th day of January, 1893, at the city of Hartford, Conn.

[L. S.] HENRY E. TAINTOR,
A Commissioner for New York in Connecticut.

Supreme Court.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

Judgment. March 1st, 1893.

The above-entitled cause having come on for trial at a circuit — held in and for the county of Rensselaer, State of New York, at the court-house, in the city of Troy, said county, on the 28th day of February, 1893, before Hon. E. L. Fursman, justice, presiding, and a jury, Hale & Bulkeley, Esqs., appearing for the defendant, and Smith & Wellington, Esqs., appearing for the plaintiff, and the issues of said cause having been tried, and the court having directed the jury to find a verdict for the plaintiff for the sum of four thousand nine hundred and eighty-six and fifty-two one-hundredths dollars, and said verdict having been duly rendered and re-
130 corded, and the plaintiff's costs having been adjusted at three hundred and nineteen and fifty-two one-hundredths dollars—

Now, on motion of Smith & Wellington, plaintiff's attorneys, it is adjudged that the plaintiff, Anna V. Conway, as administratrix of the goods, chattels and credits of William F. Conway, deceased, recover of the defendant, The Phœnix Mutual Life Insurance Company, the sum of four thousand nine hundred and eighty-six and fifty-two one-hundredths dollars damages, and three hundred and nineteen and fifty-two one-hundredths dollars costs, amounting in all to five thousand three hundred and six dollars and four cents, and that execution issue therefor.

FRANCIS RILEY, *Clerk.*

Supreme Court.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased, Plaintiff, Respondent,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Defendant, Appellant.

GENTLEMEN: Take notice, that the defendant above named hereby appeals to the general term of this court from the judgment of the

supreme court, herein entered in the clerk's office of the county of Rensselaer, on the 1st day of March, 1893, and from each and every part thereof.

Dated Albany, March 30th, 1893.

Yours, etc.,

HALE & BULKELEY,
Attorneys for the App'l't.

131 Office and post-office address, 25 North Pearl street, Albany, New York.

To the clerk of the county of Rensselaer, and to Smith & Wellington, attorneys for the resp'd't.

Supreme Court.

ANNA V. CONWAY, as Administratrix, etc.,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

It is stipulated that the foregoing are copies of the judgment-roll and notice of appeal in the above-entitled action.

Dated April 28th, 1893.

HALE & BULKELEY,
Att'ys for Def't, App'l't.
SMITH & WELLINGTON,
Att'ys for Pl'ff, Resp't.

Supreme Court, Rensselaer County.

ANNA V. CONWAY, as Administratrix, etc.,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY. } Case and Exceptions.

This action was commenced on or about the 5th day of January, 1893, and was tried at the Rensselaer circuit before Mr. Justice Fursman and a jury on the 28th day of February, 1893. The pleadings are contained in the judgment-roll, a copy of which is hereto annexed. The following proceedings were had upon the trial:

132 Plaintiff's counsel offered in evidence letters of administration to the plaintiff recorded in the Rensselaer county surrogate's office, Book 139, page 656.

It was admitted by the defendant that the authority of Messrs. M. V. B. Bull & Co., as general agents, was not limited by any resolution of the board of directors of the defendant, or by any act of the defendant, other than appears from the policy, and the renewal receipts which are sent for delivery to the agents; that there was no formal act of limitation.

Plaintiff's counsel offered in evidence the policy, a copy of which is set forth in the complaint, which was marked Exhibit A; also the letter from M. V. B. Bull & Co. set forth in the complaint, and admitted in the answer, which was marked Exhibit B, which policy and letter were received in evidence. The following is a copy of said letter:

Phœnix Mutual Life Insurance Company of Hartford, Conn.

M. V. B. Bull. H. S. Bull.

M. V. B. Bull & Co., managers.

ALBANY, N. Y., *April* 19, 1892.

Mr. W. F. Conway, Troy, N. Y.

DEAR SIR: In reply to your favor of the 18th, your renewal has remained unpaid since Oct. last, pending the maturity of your note, and we do not feel at liberty to accept a note extending the time any further. We hope, if it is possible for you to do so, you will meet the note at maturity. If you cannot do this, by way of accommodating you as far as possible, we will, if you so request, recall your note from the bank where it now lies, and hold your renewal at this office as long as it may be possible to do so. You will understand, of course, that we are likely any day to be re-
133 quired to return it to the home office for cancellation, which we hope will not be necessary, however.

Yours truly, M. V. B. BULL & CO., *Managers.*

F.

FRANK H. FELLOWS was then sworn as a witness for the plaintiff, and testified:

I am fifty years of age, and employed as cashier and accountant in the Albany office of the Phœnix Mutual Life Insurance Company. My residence is Albany. I have been employed by defendant between seven and eight years. I have copies of the reports made to the defendant from time to time. They are duplicates. The home office is in Hartford, Connecticut. That is its principal office. The president and secretary have their offices in Hartford. I remember the transaction in this case; the giving of the note by Mr. Conway. At that time I held in Albany the renewal receipt. I did not surrender the renewal receipt when the note given by Mr. Conway was received by me. I kept it. The understanding was, I was to deliver it to him when the note was paid. I had no other dealing with him than with reference to this policy that I know of. (A note shown witness signed W. F. Conway, dated Troy, October 24th, 1891, for $202.35, payable six months after date, due April 27th, 1892.) Witness says: That is the note received from Mr. Conway to apply on the renewal when the note was paid. It was the note that was given by reason of the premium that became due October 24, 1891. The firm of Bull & Co. held this note at their office and afterwards endorsed it and sent it for collection. They never had it discounted. It was recalled from the bank. They did not send it on to Hartford. It was never sent on
134 to Hartford. I have taken note from other holders of policies. It has been done during my connection with the company, and in precisely this way. We did not sometimes take a first-class note as payment and surrender the premium, unless Mr. Bull or the firm chose to advance the money and pay the premium. The money in that case would be transferred to the company's ac-

count. The firm of M. V. B. Bull and Co. in that case could do what they liked with the note. That was not done in this case.

Q. You have been accustomed to take notes merely to extend the time of the payment of the premiums?

A. Yes, sir.

Q. To what extent have you been obliged to do that?

Objected to by defendant's counsel as immaterial and incompetent, unless the alleged custom has been brought to the knowledge or notice of the assured, on the ground that it is a matter between other parties and cannot affect the dealings between these parties. The objection was overruled and defendant excepted.

A. In exceptional cases. I am not certain we took any notes to extend the time of payment of premiums during the last year. The record will not show. The record I have in court would not. The record would not show how many we took year before last. The notes do not appear upon the record.

Q. Are you able to give any idea of the number of times that the thing has been done, I mean within the last four or five years?

A. Well, of course, I have not prepared myself for that question.

Q. Your best recollection?

A. There may have been thirty or forty notes taken in the course of the year, that is, some years ago when that business was done more extensively than lately.

135 Q. When a premium is paid at your office, when it is due and paid in cash, when do you report that to the home office?

A. A premium paid in February, for instance, will be reported in March; that is, the account is made up for the month of February as soon as the work can be done in March, and reported to the home office.

Q. Suppose for my premium, which I think is due in October, I remit you a check for the amount of premium in October, when is that reported to the home office?

A. In what we call the October report, which is made as soon as possible after closing the business for October.

Q. That is, in other words, you make monthly reports?

A. Yes, sir.

Q. And the report made in November would contain my name and the number of my policy?

A. Yes, sir.

Q. And the amount of my policy?

A. The amount of the premium.

Q. It does not give the amount of the policy?

A. No, sir.

Q. But the policy would be described so they could turn to their books at the home office to that particular policy at once?

A. Yes, sir.

Q. The amount of premium and the amount paid?

A. Yes, sir.

Q. Then do you remit?

A. Yes, sir; we remit at the time of making the report.

Q. In that way the home office is kept apprised continually of the premium paid when due?

A. Yes, sir.

Q. In case I was a little short, and wanted a favor and you took my note for a couple of months, when you made your October report my name would be omitted from the list?

A. Yes, sir.

Q. If it was a two months' note, my name would be omitted from the list for the December month?

A. Yes, sir.

136 Q. When January came and the note was paid, how would you make that report?

A. Just as in all other cases, except in the column showing when the premium was due, it would show that it was due in October but paid in December or in January, as the case might be.

Q. Is that the course you have pursued with respect to the statements sent to the home office?

A. Yes, sir.

Q. With respect to these premiums which were paid after they were originally due?

A. Yes, sir, that is the course.

Cross-examined by Mr. HALE:

The signature to Plaintiff's Exhibit B, which is the typewritten letter from M. V. B. Bull & Co. to Mr. Conway, is in my handwriting; the letter was dictated by me, and signed by me.

A letter was shown witness which he says was written by Conway, and that it was the letter in answer to which the Plaintiff's Exhibit B was written. This letter was offered and received in evidence, and marked No. 1, S. C. R.

The following is a copy:

"TROY, *April* 18, 1892.

Mr. Bull.

DEAR SIR: You have a note of mine due on the 27th, which I find I will be unable to pay. I would like to have it renewed for three months and feel I will be able to meet it then. I will send you check for interest as soon as I hear from you.

Yours respt., WM. F. CONWAY,
469 *River St.*"

137 I have the charge of delivering renewal receipts for the firm of M. V. B. Bull & Co., and of making reports to the company.

Defendant's counsel offered in evidence the note referred to in the complaint, which was received, and marked Exhibit No. 2, S. C. R. The following is a copy of the same:

"TROY, *Oct. 24th*, 1891.

Six months after date, I promise to pay to the order of M. V. B. Bull & Co., two hundred two $\frac{35}{100}$ dollars at Manufacturers' nat. bank with interest, value received.

W. F. CONWAY."

The note marked No. 2 has never been paid; after the writing by me of this letter, the note was recalled from the bank by M. V. B. Bull & Co.; the writing in red ink upon the face of the note, the words "Returned from bank unpaid," is mine; the note had been sent to the Manufacturers' Bank in Troy for collection.

The witness was then shown what purported to be a renewal receipt upon the policy in question, dated October 24, 1889, which the witness identified as the receipt given by the defendant through the office of M. V. B. Bull & Co., upon the renewal of 1889 of the policy in question. Witness said he recognized it, it having been produced by the plaintiff; it is of the form of renewal receipts which are delivered and have been in all cases since 1889.

The same was offered and received in evidence, marked No. 3, S. C. R. The following is a copy thereof:

"Office of Phœnix Mutual Life Insurance Company.

HARTFORD, CONN., *Oct.* 24, 1889.

138 Received $208.85 as per margin, the same being the premium due this day on policy No. 110,890, on the life of William F. Conway for $5,000. Said contract, with all its conditions, is hereby continued in force until the 24th day of Oct., 1890, and no longer. By the terms of the policy if the premium be not paid on or before the day when due, this policy will be forfeited; and no agent is authorized in any case to waive or postpone payment of premium, or to accept it after the date at which it falls due, without special permission from the president or secretary of the company.

No receipt for premium will be in any way binding except on a printed form, signed by the president or secretary of the company. This receipt shall not be valid unless countersigned by M. V. B. Bull, general agent.

CHAS. H. LAWRENCE, *Secretary.*"

On the margin the following is printed and written:

"No. 110,890.

Original premium	$239.35
Less rebate	30.50
Premium for 1889	$208.85

Received premium, this 24th day of Oct., 1889.

M. V. B. BULL,
Agent, Albany, N. Y."

The witness was also shown a similar receipt for 1890, which he identified, and which was offered in evidence and marked No. 4, S. C. R., and was precisely the same as Exhibit No. 3, except as to date and amount.

I do not remember personally the transaction with reference to this note of Mr. Conway's of October 24, 1891. Don't remem-
139 ber whether the arrangement was made by correspondence or a personal interview. The renewal receipt for 1891 was sent to our office with other renewal receipts at the same time, and was sent for delivery upon the payment of the premium; the renewals in our office, as near as I can estimate, would be from 300 to 400 a month. In our reports to the company we make no reports of anything except cash. No report was ever made to this company prior to the death of Mr. Conway and the claim made by the estate, of any note having been taken by Bull & Co., to my knowledge. I mean the home office of the company in Hartford. The renewal receipts are issued from the home office. Sent by them to the agents, Bull & Co., in Albany, and by the agents delivered to the policy-holders upon the payment of the premium. No report was ever made prior to Conway's death to the home office of any note having been taken from Conway, to my knowledge. I make the reports. I have had knowledge of the reports ever since I have been in the office, although I have not made them myself until lately. I think I made the reports in October, 1891. I have a copy of the report I made (which witness produces). These reports I brought here upon the subpœna of the plaintiff.

Q. Turn to the report for October, 1891, and look through and see whether the name of Mr. Conway appears at all in that October report.

A. It should have appeared there if at all, but it was erased; that is, the name appears, the name "Conway" and "N. Y." under 110,890; the amount of the premium, the amount of the dividend, the net amount of premium $202.35 and the commission is erased. It was written in but was erased by red ink. That was erased in the report made to the company. That is the only name erased there. I might explain that the error was a clerical error.
The name should not have appeared there at all. It was
140 erased in the original report. It is a copy of the original report, erasures and all. It does not appear in any subsequent report. This note was never sent to the home office. So far as I have any knowledge or information, the home office was never informed of this note during Mr. Conway's life. I never informed them. I remember a person coming to our office and claiming to represent the estate, and urging a settlement on the ground that they were ready to pay this premium if it would be accepted. I can't give the date. It was subsequent to Mr. Conway's death. That is all I know. Proofs of death were presented the 31st of May. That was the only time when any demand was made of our office. That was the only proffer of the premium so far as I know. At the time this demand or proffer was made, the renewal receipt

had been returned to Hartford to the home office of the company. I had heard of Mr. Conway's death before the receipt was returned. I had no formal notice of it. But after that the renewal receipt was returned to the home office. The premium which became due on the 24th day of October, 1891, was never paid.

Redirect examination:

I didn't copy this book. This is a copy made in the office. A clerk, John McNamara, made it. In speaking of this book, I refer to the book containing copy of reports made by our office in Albany to the home office.

Q. Do you know whether the corresponding line was drawn through the original report sent to the home office?

A. It should have been. Of course, I don't know. This is a copy of the company's report. It reads as follows: Under the head of "Life insured" "Conway," his residence is put down as "N. Y." meaning New York State. Under the column headed "When due" is "October, '91." Under the column headed "Premium" is "$239.25." And under the head of "Dividend" "$37."
141 Under the head "How paid" is "Cash, $202.35." Through that line is a red-ink line drawn evidently against the edge of a ruler—a line running across the page and apparently cancelling the name and amounts I have stated.

Q. Assuming that the error of putting Conway's name in there occurred in the original report, what would that line drawn through indicate?

A. Simply that it had been put in there by error; that is not an uncommon thing; it would indicate that the premium due then was not paid, although by an error it had been put in.

Q. Will you add up that column headed "Premium" and see whether the footing at the bottom includes or excludes the amount of Conway's premium?

(Witness added up the column and answered:) It excludes the premium; we did not remit to the home office for the premium as though it were a cash premium. I think the person pretending to represent Mr. Conway's estate called on us subsequent to May 31st. That is my impression. I think it was not very long after that. Am not certain about the date. I am very sure it was subsequent to the receipt of the proofs of death, which was May 31st. Application was made to the Albany office for proof of death for blanks, which were forwarded. Our office was not requested to make them out; that is never done. I don't remember any such request. Blanks were furnished, I think, to this same representative. I think his name was Murray. They were subsequently received by us. When Mr. Murray or whoever it was called and offered to pay the premium, the premium receipt was at the home office. It had been sent there after the death of Mr. Conway.

Q. Take my case, for example, and suppose I decided not to pay my premium next October, and fail to pay it, and the policy is forfeited, what do you do with the renewal receipt?

142 A. As soon as we are satisfied that the collection cannot be made, we return it to the home office for cancellation. (Paper shown witness), who says, This is the first premium receipt which is furnished with the policy itself at the time the policy is given. It is a little different in form from the others.

The same was offered by the plaintiff and received in evidence marked C. The following is a copy:

"*First Premium Receipt.*

Office of Phœnix Mutual Life Insurance Company.

HARTFORD, CONN., *October* 24, 1887.

Received the sum of two hundred and thirty-nine dollars and thirty five cents, being the first payment of premium on policy No. 110,890 on the life of Wm. F. Conway for $5,000. Said contract, with all its conditions, is hereby rendered in force from the date of this payment, as per margin, to the 24th day of October, one thousand eight hundred and eighty-eight, and no longer.

This receipt shall not be valid, or in any way binding on this company, unless payment in full shall be made as above, during the lifetime of said insured, and this receipt countersigned by M. V. B. Bull & Co.

J. M. HOLCOMB, *Secretary.*"

On the margin the following is printed and written:

"Received the within-named amount this 24th day of Oct., 1887.
M. V. B. BULL & CO.,
Agents, Albany, N. Y."

We always make an effort to collect, if possible, the premium before returning the premium receipt. It is the custom if
143 we make the collection, even though we make it late, to accept it and surrender the premium receipt.

Q. When such a lapse occurs—that is, when such a delay occurs in the payment of the premium, a delay of a few days or a week, or a month, does that appear upon the reports?

A. No, sir, it does not.

Q. You treat a payment made during the month of December, for example, even though a few days late, as though paid when due?

A. Yes, sir.

Q. That has been your custom for years?

A. Yes, sir.

Q. Where there is no promise to pay and there has been no extension of time granted in the payment of the premium, do you ever hold a renewal receipt for several months without returning it?

A. Yes, sir. The custom of the office is to send out reminders from time to time and urge the payment; when it becomes evident that the collection cannot be made, the receipt is returned, or when

it becomes evident that it is not the intention of the holder to continue his policy. When we find that out, we return it at once, and don't thereafter hold the premium receipt.

Recross-examination by Mr. HALE:

Q. In such a case, if you learned that the party was dangerously ill, after the time had lapsed, would you still receive payment and deliver?

A. No, sir; we are under instructions not to do so.

Q. You judge of that as to whether it is a proper case?

A. Yes, sir.

Q. These renewal receipts you receive from Hartford?

A. Yes, sir.

Q. You began to testify when you were interrupted by Mr. Wellington, as to some explanation in regard to that erasure. What else did you wish to say?

A. I was going to suggest that by explaining about the method of making the report the erasure may be easily understood.

144 The premiums as collected are entered in the cash book in the order in which they are received. They are then, after the close of the books for the month, checked off on the renewal register. Each one collected is marked. The report is then made out beginning back on the renewal register as far as any cases may remain unpaid, and those that have been marked paid are entered on the report. These entries in the renewal register follow line by line something in the fashion they do in the report there, and it sometimes happens that by carelessness an unpaid premium is copied from the renewal register into the report. When the report is completed it is balanced up, and the balance compared with the balance in the cash book. When that is found not to agree then the error is looked for, and if a premium has been entered that has not been paid, it is erased in this way.

Q. The renewal book contains all the premiums which come due during the month in question?

A. Yes, sir.

Q. And the error consists in copying from that instead of from the cash book?

A. Yes, sir; the cash book contains only those which are paid. Mr. Conway had never before October, 1891, given a note for his renewal to my knowledge. He had paid in cash in all cases before.

Redirect examination by Mr. WELLINGTON:

Q. You said to Mr. Hale that you, holding a past-due renewal receipt, and finding out the man was ill, you would send the receipt back to the home office, that those were your instructions. Is that the way you intended to answer?

A. I think you misunderstood me. I said our instructions were not to receive a payment where the party was out of health and the

renewal past due. About returning it to the office would depend upon circumstances.

145 Q. Your instructions from the home office are that where you have granted indefinite extensions of time, the terms of which are not fixed, you are not to receive payment when you ascertain the man is in poor health?

A. Yes, sir.

Q. How long has that rule been in vogue?

A. Several years.

Q. Of course, you can't do that where the terms of the extension are fixed, as in the case of a note?

A. Of course, if a note, that is supposed to fix the term for the life of the note.

Recross-examination by Mr. HALE:

Q. Do you mean to say you have any instructions or permission from the company to give an indefinite extension of time in any case?

A. No, sir.

Q. Do you mean to say you ever do give an indefinite extension of time for the payment of premium?

A. No, sir.

Q. Is not the instruction that you refer to with reference to whether you can take a premium after it becomes due?

A. That is the idea.

Q. Do I understand you that you are prohibited from doing that if you learn that the man is in poor health?

A. Yes, sir.

Q. How are those instructions given you?

A. Well, the instructions reached me through Mr. M. V. B. Bull.

Q. The agent in Albany?

A. Yes, sir.

Q. Have you ever received any instructions from the home office upon the subject, except as appears by the policies and renewal receipts?

A. Yes, sir; I have seen a letter in which they stated that in case of accepting a past-due premium, it was necessary that we be assured that the party was in good health.

Q. That was what you meant by your answer to Mr. Wellington's questions?

A. Yes, sir.

146 Redirect examination by Mr. WELLINGTON:

Q. You do not mean to say, do you, that you do not occasionally accommodate your policy-holders by waiting a while on them?

A. No, sir; I don't mean to say that. I mean to say that the rule as it has been explained here, has been pretty carefully lived up to.

Q. You would not take a past-due premium from a man who was

on his death-bed or who was likely to die soon? You would then claim a forfeiture?

A. Yes, sir.

Q. Has it not been your custom to accommodate your able-bodied policy-holders who were not able for one reason and another to pay the premiums when they became due? You would permit them?

Objected to as immaterial and incompetent.

The COURT: I think it already appears that they were in the habit, as the books show, and as the witness testifies, when a premium became due, not to report it to the company in their reports for that month, and months afterwards accepting it and putting it in the reports.

Q. Whether you have been in the habit of granting extensions of premiums due without any fixed limit of time?

Objected to by defendant that the habit or custom of the company with other policy-holders, unless it was proved it was communicated to the assured in this case and relied upon by him, is incompetent and immaterial.

The COURT: I admit it in connection with the other testimony upon the subject of what has been done, as some evidence as to whether the company did not know of it and acquiesce in it.

A. To the question in that form I answer no.

Q. State what sort of extension you have been in the habit of granting.

147 A. Policy-holders have been sometimes in the habit of obtaining extensions for themselves by failing to pay.

(The COURT:)

Q. Without any agreement upon the subject?

A. Yes, sir.

Q. Have you never agreed to let the question stand a week where a man was perfectly good?

A. At his risk.

Q. That is, if he died in the meantime?

A. Yes, sir; or his health failed in the meantime.

Q. If he continued well financially and physically, you would at the end of the time agree to accept his money and give him his receipt?

A. Yes, sir.

The plaintiff here rested.

Defendant's counsel offered in evidence the affidavit of Charles F. Gladding, which was received and marked "No. 5, S. C. R." The following is a copy:

N. Y. Supreme Court.

ANNA V. CONWAY, as Administratrix, etc., of William F. Conway, Deceased,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

STATE OF CONNECTICUT, } ss:
City and County of Hartford, }

Charles F. Gladding, being duly sworn, says that on the 31st day of August, 1891, he was a clerk of the above-named defendant, and was duly authorized as agent of said defendant to serve notices upon policy-holders residing in the State of New York, under section 1 of chapter 341 of the Laws of the State of New York for
148 1876, as amended by section 1 of chapter 321 of the Laws of said State for the year 1877. That on the said 31st day of August, 1891, deponent, on behalf of the said company, duly addressed and mailed at the post-office in the said city of Hartford and paid the postage thereon to William F. Conway, the person whose life was assured by the policy of said company No. 110,890, at the place of residence of said Conway at Troy, Rensselaer county, N. Y., a notice of which the following is a copy:

"The Phœnix Mutual Life Insurance Co.

HARTFORD, CONN., 8–31, 1891.

The premium on policy No. 110,890 will become due Oct. 24th, 1891, and if not paid, the policy and all payments thereon will become forfeited and void, except as otherwise provided in the policy.
CHARLES H. LAWRENCE, *Secretary.*"

The above notice is sent as required by chapter 341, 1876, and 321, 1877, of the Laws of New York. It is not to replace the usual itemized renewal notice (which is intended to be sent in due course, without responsibility for omission or miscarriage), nor to prevent payment through authorized agents.

CHAS. F. GLADDING.

Subscribed and sworn to before me, at the city of Hartford, in the State of Connecticut, this 7th day of February, 1893.

In witness whereof, I have hereunto set my hand and
[L. S.] official seal at said city of Hartford, this seventh day of February, A. D. 1893.

HENRY E. TAINTOR,
A Commissioner for New York in Connecticut.

149 STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I hereby certify that Henry E. Taintor, of Hartford county, of Hartford and State of Connecticut, was, at the time of administering the oath or affirmation mentioned in his annexed certificate, a com-

missioner for the State of New York, to take the proof and acknowledgment of deeds and other instruments to be used or recorded in this State, and to administer oaths and affirmations. And that such commissioner was, at the time aforesaid, duly authorized to take the same, and that I have compared the signature of the said commissioner to the certificate subjoined to the annexed instrument with the signature of such commissioner deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in this office, and I verily believe the signature and impression of the seal to the said certificate to be genuine.

Witness my hand and the seal of office of the secretary of
[L. S.] state at the city of Albany, this eighth day of February, in the year one thousand eight hundred and ninety-three.

FRANK RICE,
Secretary of State.

Defendant then offered in evidence a letter dated April 20, 1892, which was received without objection and marked No. 6, S. C. R., and is as follows:

"TROY, *April* 20, '92.

M. V. B. Bull & Co.

DEAR SIRS: Yours of the 19th duly rec. I find I will be
150 unable to pay note when it matures, and I hope you will recall it from bank and hold it until I can meet it, which I will do as soon as possible.

Yours respt., WM. F. CONWAY,
469 *River St.*"

The testimony being closed, plaintiff moved that the jury be directed to find a verdict for the plaintiff for $4,986.52, being the amount claimed with interest computed from thirty days after the receipt of proofs of death, less the amount of the note with interest from April 27th, 1892.

Defendant moved that the jury be directed to find a verdict for plaintiff for $1,000 with interest from the same date as above stated, which was conceded to amount to $40 and for no more.

Defendant's counsel then asked the court to rule and to instruct the jury as follows:

First. That by the failure of the assured to pay the premium which became due October 24, 1891, the policy ceased and came to an end, and the rights of the assured thereunder were forfeited and became void, except that the defendant became and was liable under said policy, upon the death of the assured, to pay to his legal representatives as many twentieths of the amount of the policy as there had been paid full years' premiums thereon.

The court refused so to hold or charge and defendant excepted.

Second. That there is no evidence in the case from which the jury have a right to find any waiver by the defendant of the forfeiture of the policy resulting from the non-payment by the assured of the premium which became due October 24, 1891.

The court refused so to hold or charge and defendant excepted.

Third. That no valid extension of the time of payment of said premium which became due October 24, 1891, has been proved in this case.

151 The court refused so to hold or charge and defendant excepted.

Fourth. That even if the taking by Bull & Co. of the note dated October 24, 1891, operated as an extension of the time of payment of said premium, said extension was conditioned on the payment of said note on or before maturity, and said note not having been paid, the condition of such extension failed and the forfeiture was not waived.

The court refused so to hold or charge and defendant excepted.

Fifth. That the letter of Bull & Co. to the assured, dated April 19th, 1892, of which a copy is set forth in the complaint, did not extend the time for the payment of the said premium.

The court refused so to hold or charge and defendant excepted.

Sixth. That the statement in said letter of April 19, 1892, which is as follows, "You will understand, of course, that we are likely any day to be required to return it (the renewal) to the home office for cancellation," was taken in connection with the terms of the policy and of the renewal receipt of October 24, 1890, notice to the assured that the writers of said letter had no power or authority to extend the time of payment of said premium beyond the time of maturity of said note.

The court refused so to hold or charge and defendant excepted.

Seventh. That Messrs. M. V. Bull & Co., general agents of the company, had no power or authority to waive or postpone payment of said premium or to accept it after the date at which it fell due without special permission from the president or secretary of the company, and that the assured had notice of such want of power or authority on the part of said agents.

The court refused so to hold or charge and defendant excepted.

152 Eighth. That the delivery of the renewal receipt signed by the president or secretary of defendant was necessary upon the receipt by the defendant or its agents of the premium due October 24, 1891, in order to extend the liability of defendant under its policy beyond October 24, 1891, except so far as it had become liable by the payment of three or more full years' premiums; and that no such renewal receipt having been given, the defendant is not liable in this action except for four-twentieths of the amount of said policy and interest thereon.

The court refused so to hold or charge and defendant excepted.

Ninth. That plaintiff is entitled to a verdict of $1,040 against the defendant and for no more.

The court refused so to hold or charge and defendant excepted.

The court refused to hold or to charge each of said propositions, and to each refusal the defendant's counsel duly excepted.

The court, in disposing of the motions and requests, used the following language:

This is one of the most interesting cases with which I have come in contact in a long time, and it presents some of the most difficult questions. I should have been glad to have had more time to have considered them, and to have examined the authorities which have been cited, but as counsel would not give it to me I must guess at it as best I can now.

I think it would be better, in any aspect of the case, to direct the verdict according to the plaintiff's contention, because, if that should be wrong, the general term can then modify it so as to reduce the verdict according to the defendant's contention; whereas, if I should direct a verdict as the defendant claims, for $1,040, and that should turn out to be wrong, the case would necessarily have to come back. Aside from that, according to my mind, the plaintiff's contention is right. There is evidence here that these people—
153 M. V. B. Bull & Co.—are the general agents for the State of New York for this defendant, whose chief office is in Connecticut; that at the chief office they keep an account in their books of the assured who have policies in their company, which account also denotes the time when the premiums upon the policies fall due; that they prepare and send to the general agents these renewal premium receipts, copies of which have been given in evidence here. It is apparent that they do that before the premium falls due, in anticipation of its payment. According to the course of business, it appears here that the general agents sent back to the company at the home office a list of the assured whose premiums, falling due say in the month of October (I use that by way of illustration because it is this case), have been paid, and they omit from that record the names of those whose premiums have not been paid. It appears also that it has been their habit afterwards—sometimes months afterwards—to receive premiums falling due in the month of October, and which were not then paid, and not notified to the company as paid, and then to notify the company in the month in which the premium is subsequently paid of such payment. That was notice to the company that they have been in the habit of permitting persons to take time for the payment of their premiums. This they have done, according to the proof, constantly and for years.

Now when this payment fell due they put into the report the name of this man Conway as having paid his premium in cash, and then they erase it. They thus called the attention of the company directly to this particular case. The company had provided them with this renewal receipt—they had it in their possession. It appears from the letter which Bull & Co. sent to Conway that the renewal receipt could only be cancelled by the company at the home office, because they declare to Conway in
154 it that the extension, if it can be said to be an extension, was subject to the recall of the receipt by the home office for cancellation. Thus the company knew that they had not been paid. The agents took this note—as I think thereby extending the time in which this premium might be paid—according to the custom of their business, so the company at the home office had notice such

as I have suggested; they may be said to have held that renewal receipt for Conway during all that time, and upon a contract to which the company assented, and in which it acquiesced under the circumstances to deliver it upon the payment of the premium—that is, upon the payment of the note. If he had died before that note became due, I do not think there would have been any question about the right of the plaintiff to recover in this case.

He could not pay this note, when it became due, and these agents having this authority, or carrying on its business in this way, acquiesced in by the company, as I suggested, agreed with him to accept a premium at a future time, which must be held, I suppose, to be a reasonable time, subject to any call that might be made by the company in the meantime for this renewal receipt, which they held for him until the premium should be paid, or until it was recalled by the company. In the meantime, and with that arrangement outstanding, and before this renewal receipt was recalled, the plaintiff died. Now, I think that contract was in force—just as much in force as though that renewal receipt had been actually delivered. Perhaps I may be wrong. It is exceedingly debatable, as the arguments of the counsel upon both sides have shown. I have had no chance to examine the authorities, or to reflect upon them at all except during the argument, but this is the view I take of it. Whether I am right about it or not, I recur to my original statement that I think the wiser course for me is to direct a
155 verdict for the plaintiff, although I think if counsel insists upon it, I must submit to the jury the question whether there was a waiver——

(The counsel stated that they did not ask it.)

I think it is the wiser course to direct a verdict for the plaintiff for the full amount, because if I am wrong the general term or the court of appeals can modify it down to the $1,040 as requested by the defendant; whereas, if I direct it for the $1,040 as requested by the defendant it has got to come back here, and I know and every other lawyer who has heard it knows it must go to the court of last resort, and it ought to go there. Therefore, I will direct a verdict for the plaintiff for $4,986.52.

Defendant excepted to the direction of the court to find a verdict for the plaintiff for $4,986.52, and also to its refusal to hold that plaintiff was entitled to a verdict against the defendant for $1,040 and no more.

A verdict was then rendered under the said direction of the court for $4,986.52.

And because the evidence and exceptions taken upon the said trial do not appear in the judgment-roll, this case, which contains all the evidence and proceedings upon the said trial, has been made and annexed to the said judgment-roll.

HALE & BULKELEY,
Attorneys for Defendant.

Supreme Court.

ANNA V. CONWAY, as Administratrix, etc.,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

156 The attorneys for the defendant in the above-entitled action, having assented to all the amendments proposed by the plaintiff to the case proposed by the defendant herein, it is hereby stipulated that the said case be considered as settled as of this date.

It is further stipulated that the said case as settled and agreed upon need not be filed nor any order to file be obtained from the justice before whom the action was tried until after the same shall have been printed, and that the filing thereof within the time required by rule 35 of the general rules of practice is hereby waived.

Dated April 28th, 1893.

HALE & BULKELEY,
Att'ys for Def't, App'l't.
SMITH & WELLINGTON,
Att'ys for Pl'ff, Resp't.

The foregoing case is hereby settled. That portion of the testimony by question and answer is so ordered by me, and it is ordered that the case, as settled and signed, be filed in the office of the clerk of the county of Rensselaer.

Dated April 28th, 1893.

E. L. FURSMAN,
Justice Supreme Court.

157 At a general term of the supreme court, held in and for the third department, at the city hall, in the city of Albany, at the term beginning May 9th, 1893.

Present: Hon. Stephen L. Mayham, presiding justice; Hon. John R. Putnam, associate justice; Hon. D. Cady Herrick, associate justice.

ANNA V. CONWAY, as Administratrix of the Goods and Chattels of William F. Conway, Deceased, Respondent,
ag'st
PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

The defendant's appeal from the judgment herein in favor of the plaintiff for the sum of five thousand three hundred six and $\frac{4}{100}$ dollars, entered in Rensselaer county, March 1st, 1893, having been brought on for argument, Mr. Matthew Hale appearing for the appellant, and Mr. G. B. Wellington for the respondent, and due deliberation had,

It is ordered, that said judgment be affirmed with costs.

JAS. D. WALSH, *Clerk.*

A true copy.
Enter in Rensselaer Co.

JAS. D. WALSH, *Clerk.*

158 Supreme Court.

ANNA V. CONWAY, as Administratrix of the Goods and Chattels of William F. Conway, Deceased, Respondent, *ag'st* THE PHŒNIX MUTUAL LIFE INSURANCE Company, Appellant. } Judgment of Affirmance. May 11th, 1893.

The defendant having appealed to the general term of the third department from the judgment entered herein March 1st, 1893, in favor of the plaintiff, for the sum of five thousand three hundred and six and $\frac{1}{100}$ dollars, and said appeal having been brought on for argument at said general term, held in the city hall, in the *the* city of Albany, beginning May 9th, 1893, Mr. Hale appearing for the appellant, and Mr. Wellington for the respondent, and said general term, after due deliberation had, having ordered that said judgment be affirmed with costs, and the plaintiff's costs having been adjusted at seventy-five and $\frac{17}{100}$ dollars,

Now, on motion of Smith & Wellington, plaintiff's attorneys, it is adjudged that said judgment be and the same hereby is in all things affirmed, and that the plaintiff, Anna V. Conway, as administratrix, etc., recover of the defendant, The Phœnix Mutual Life Insurance Company, the sum of seventy-five and $\frac{17}{100}$ dollars costs.

FRANCIS RILEY, *Clerk.*

159 Supreme Court.

ANNA V. CONWAY, as Administratrix of the Goods, Chattels, and Credits of William F. Conway, Deceased, Plaintiff, Respondent, *against* THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Defendant, Appellant.

GENTLEMEN: Take notice, that the defendant, appellant, hereby appeals to the court of appeals of the State of New York, from the judgment of the general term of the supreme court, herein entered in the clerk's office of the county of Rensselaer on the 11th day of May, 1893, affirming a judgment of this court entered in said clerk's office on the 1st day of March, 1893, and from each and every part thereof.

Dated May 13th, 1893.

Yours, etc.,

HALE & BULKELEY,
Attorneys for the App'l't.

Office and post-office address, 25 North Pearl street, Albany, N. Y.

To the clerk of the county of Rensselaer and to Smith & Wellington, Esqs., attorneys for the resp'd't.

160 Supreme Court.

ANNA V. CONWAY, as Administratrix of the Goods and Chattels of William F. Conway, Deceased, Respondent,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

It is hereby stipulated that the foregoing are copies of the case, judgment-roll, notice of appeal to the general term, and notice of appeal to the court of appeals herein, the originals of which are filed in the office of the clerk of Rensselaer county, and said copies are true copies of the whole of said originals.

Dated May 16th, 1893.

SMITH & WELLINGTON,
Plaintiff's Attorneys.
HALE & BULKELEY,
Defendant's Attorneys.

Supreme Court.

ANNA V. CONWAY, as Administratrix, etc., of William F. Conway, Deceased, Respondent,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

CITY AND COUNTY OF ALBANY, *ss:*

161 & 162 Alpheus T. Bulkeley, being duly sworn, says that he is one of the attorneys for the defendant in the above entitled action; that to the best of the knowledge and belief of deponent, no opinion was written by any judge of the general term of this court on the affirmance of the judgment herein.

ALPHEUS T. BULKELEY.

Sworn to before me this 13th day of May, 1893.

WM. S. BEERS,
Notary Public, Albany Co., N. Y.

163 In the Court of Appeals of the State of New York.

ANNA V. CONWAY, as Administratrix, etc., of William F. Conway, Deceased, Respondent,
against
THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant.
} Brief of Appellant.

Appeal by defendant from a judgment of the general term of the third department affirming a judgment for $5,306.04 damages and costs, entered upon a verdict rendered by the direction of the court.

This action was brought to recover upon a policy of insurance for $5,000 issued by the defendant upon the life of plaintiff's intestate. (See policy, fols. 25–38.)

The complaint alleges the death of the insured on the 8th day of May, 1892, intestate, and the appointment of the plaintiff as his administratrix; and sets forth the policy.

It, also, alleges the issuing by defendant, for a valuable consideration, upon the life of William F. Conway, of the policy, a copy of which is annexed to the complaint, and that the annual premiums were paid thereon each year, down to October 24, 1891. (Fols. 9, 10.) It alleges that the defendant's general agents
164 and managers were and are the firm of M. V. B. Bull & Co., of Albany (fol. 10); that on the 24th day of October, 1891, Conway gave to the general agents of defendant his promissory note for $202 35, payable six months from date, and that the agents accepted the note, and thereby extended the time of payment of the premium due October 24, 1891, six months (fol. 11); that the defendant, for a valuable consideration, extended the time of payment of the premium for said six months, and that the deceased, relying upon such extension, did not pay the premium upon the 24th day of October, 1891, and that the defendant is estopped from claiming a forfeiture of said policy by reason of the non-payment in cash of said premium on the 24th day of October, 1891. (Fol. 12.)

That on the 19th day of April, 1892, the said general agents of defendant wrote the deceased a letter which is set forth at folios 13 and 14, and that the deceased relied upon that letter, and did not pay the note at maturity; that defendant is estopped from claiming that the policy was forfeited by the non-payment of the note at maturity. (Fols. 12–15.)

That before the premium receipt or renewal was returned to the home office, the said deceased died, and that after his death, the plaintiff through a representative offered to pay the note, but such offer was declined; that on the 30th of May, 1892, the proofs of death required by the policy were served upon the defendant. (Fol. 16.)

That the defendant with full knowledge of all the facts hereinbefore stated, after the death of said Conway, required the plaintiff at expense and trouble to her, to prepare and verify said proofs of death, and to procure county clerk's certificates at an expense to plaintiff, and that the defendant thereby intended to and did waive any invalidity of said policy. (Fol. 17.)

That the defendant never served the notice required by the statute within the time required by the statute, that said policy would lapse or be forfeited in case of the failure of the assured
165 to pay the premium due by the terms of the note, April 27, 1892, or by the terms of said letter, within a reasonable time thereafter; and that the defendant did not serve any such notice respecting the premium originally due October 24, 1891. (Fol. 18.)

That the general agents had power and authority to extend the time of payment of the premium originally due October 24, 1891, and had apparent power and authority to extend such time, which was known to the defendant, and upon which said deceased relied,

and that the defendant is thereby estopped from claiming that said agents and managers had not such authority. (Fols. 19, 20.)

The complaint also contains a consent that the note may be offsetted against the sum of $5,000 claimed to be due from the defendant to plaintiff. (Fol. 20.)

The answer admits that it is a corporation and that William F. Conway died, leaving a widow and next of kin at the time alleged in the complaint. (Fol. 40.) Admits the execution of the policy, a copy of which is annexed to the complaint, and that the annual premiums thereon were paid each year prior to the 24th day of October, 1891. (Fol. 42.) Admits that M. V. B. Bull & Co., of Albany, were, at the times alleged in the complaint, general agents for the defendant within the State of New York. (Fol. 43.) Admits the giving of a note by said William F. Conway to said M. V. B. Bull & Co., a copy of which note is set forth in the answer at folio 44, but alleges, upon information and belief, that the note was not given to M. V. B. Bull & Co., as agents of defendant, and that it was never owned or held by defendant, and alleges that the note has never been paid. (Fols. 44, 45.) Admits that the said M. V. B. Bull & Co. wrote to the said Conway a letter, a copy of which, in substance, is set forth in the complaint. (Fols. 45, 46.) Sets forth a letter from Conway to Mr. Bull, to which the letter set forth in the complaint was an answer. (Fols. 46–48.)

The answer further admits that before the premium receipt or renewal had been returned by said M. V. B. Bull & Co., to the home office of the defendant, and while the same was in the pos-
166 session of M. V. B. Bull & Co. the said Conway died, and that after his death a person claiming to be a representative of said Conway verbally offered to pay the note, which offer was not accepted. The answer alleges that said offer was not made until many days after the premium receipt had been returned to the home office, and that said M. V. B. Bull & Co. make no claim against the plaintiff or against the estate of said William F. Conway upon said note, but are ready and willing to surrender it to plaintiff. (Fols. 49–51.)

The answer also admits the service of proofs of death on or about the 30th day of May, 1892, and that the defendant never served any notice upon the assured in regard to the lapse or forfeiture of the policy, except the notice, a copy of which is set forth in the answer. It also admits that before the commencement of the action payment of said policy was demanded of the defendant and that the defendant refused to pay the entire amount or any amount greater than the sum for which it admits that it was liable under the policy. (Fol. 52.)

The answer also denies each and every allegation of the complaint not thereinbefore admitted or denied. (Fol. 53.)

The answer further alleges that on the 31st day of August, 1891, which was at least thirty and not more than sixty days prior to the day when the premium of October 24, 1891, became due, the defendant served upon the said William F. Conway a notice, partly written and partly printed, by causing the same to be duly ad-

dressed and mailed to said William F. Conway, a copy of which notice is set forth in the answer, which was to the effect that the premium on the said policy would become due October 24, 1891, and that if not paid, the policy and all payments thereon would become forfeited and void, except as otherwise provided in the policy. (Fols. 55–57.)

That on said 24th day of October, 1891, the annual premium upon the policy became due by its terms; that the said William F. Conway omitted and neglected to pay the same; that the same has never been paid to the defendant or any agent or officer thereof, nor any separate receipt signed by the president and secretary
167 of the company given therefor; and that by reason of such omission, by the terms of the policy, the same ceased and came to an end, and the rights of the assured were forfeited and became void, except that under the policy three or more full years' premiums having been paid thereon, the defendant became liable on the death of the said assured for a sum equal to as many twentieths of the amount of the policy as there had been paid full years' premiums thereon, subject to the indebtedness of the assured to the company; and that under said policy four full years' premiums having been paid, the defendant became liable to pay to the representatives of the deceased the sum of $1,000, which amount the defendant has since the service of the proofs of the death of the said William F. Conway, always been ready and has offered to pay, and by its answer offers to pay to the plaintiff; but the defendant denies that it is liable for any further or greater sum than the said sum of $1,000, with interest from June 29, 1892. (See answer, par. 12, fols. 54–61.)

The answer further alleges that defendant has never made, authorized or ratified any extension of the time for the payment of the premium which became due October 24, 1891, or waived the forfeiture of the policy caused by the omission of the assured to pay the premium when due. (Fol. 61.)

The answer further states that upon the payment of each of the annual premiums which became due prior to October 24, 1891, a renewal receipt was given by defendant to the assured which contained a clause which is set forth in the answer, stating that if the premium is not paid on or before the day when due, the policy would be forfeited, and that no agent is authorized in any case to waive or postpone payment of premium or to accept it after the day at which it falls due, without special permission from the president or secretary of the company (fol. 63); and that no permission was given by the president or secretary of the company to waive or postpone the payment of the premium which became due October 24, 1891. (Fol. 64.)

168 The case was tried at the Rensselaer circuit before Mr. Justice Fursman and a jury on the 28th day of February, 1893.

At the close of the evidence the plaintiff moved that the jury be directed to find a verdict for the plaintiff for $4,986.52, being the amount claimed, with interest computed from thirty days after the

receipt of proofs of death, less the amount of the note, with interest from April 27, 1892. (Fol. 172.)

The defendant moved that the jury be directed to find a verdict for the plaintiff for $1,000, with interest from the same date, which was conceded to amount to forty dollars, and for no more. (Fol. 172.)

Various requests were made to the court by the defendant, which were denied, and the court directed a verdict for $4,986.52 (fol. 197), to which the defendant excepted, and also to the refusal of the court to hold that plaintiff was entitled to a verdict for $1,040, and no more. (Fols. 197, 198.)

Judgment was entered upon this verdict (fol. 68), from which an appeal was taken to the general term (fols. 74, 75), which affirmed the judgment. (Fol. 211.) No opinion was written at general term. (Fols. 225, 226.) This appeal is from the judgment of affirmance.

Facts.

The facts in the case are substantially undisputed. They are, so far as a statement of them is deemed material, as follows:

1. The policy which was issued October 24, 1887 (fol. 36), contained the following clauses:

That all permits for residence, travel or occupation which may be granted, and all other agreements, to be binding on this company, must be in writing and signed by its president or secretary, *and that no agent or other person can alter, modify or waive any of the terms or conditions of this policy.*

169 That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the insured, and that *if any subsequent premium hereon be not paid when due, and a separate receipt signed by the president or secretary of this company, in each case given therefor, then this policy shall cease;* but when after three or more full years' premiums shall have been paid hereon this policy shall cease for non-payment of any premium when due, then and thereafter this company shall be liable under this policy for a sum of non-participating paid-up insurance which shall be equal to as many twentieths of the amount of this policy as there shall have been paid full years' premium hereon, payable as above at death, or at the date provided for the maturity of this policy, and subject to any indebtedness of the insured or assured to the company. (Fols. 31–34.)

2. The premiums on the policy up to and including October 24, 1890, were paid by the assured in cash, as appears by the renewal receipts for 1889 and 1890. (Fols. 110, 113, 115.)

See also complaint (fol. 10) and answer (fol. 42), and testimony of Frank H. Fellows. (Fol. 144.)

3. Upon the 24th day of October, 1891, the assured, W. F. Conway, did not pay the premium then due, but gave a note to M. V. B. Bull & Co., who are the general agents of the defendant at Albany, of which the following is a copy:

TROY, *Oct.* 24, 1891.

Six months after date, I promise to pay to the order of M. V. B. Bull & Co., two hundred two $\frac{35}{100}$ dollars at Manufacturers' nat. bank with interest, value received.

(Fol. 107.) W. F. CONWAY.

This note has never been paid. (Fol. 107.)

4. On or about the 18th day of April, 1892, the assured sent to one of said general agents at Albany a letter, of which the following is a copy:

"TROY, *April* 18, 1892.

"Mr. Bull.

"DEAR SIR: You have a note of mine due on the twenty-
170 seventh, which I find I will be unable to pay. I would like to have it renewed for three months and feel I will be able to meet it then. I will send you check for interest as soon as I hear from you.

"Yours respectfully, WM. F. CONWAY,

(Fols. 104, 105.) "469 *River St.*"

5. In reply to this letter, the said general agents wrote to the assured a letter of which the following is a copy:

Phœnix Mutual Life Insurance Company of Hartford, Conn.

M. V. B. Bull. H. S. Bull.

M. V. B. Bull & Co., managers.

ALBANY, N. Y., *April* 19, 1892.

Mr. W. F. Conway, Troy, N. Y.

DEAR SIR: In reply to your favor of the eighteenth, your renewal has remained unpaid since October last, pending the maturity of your note, and we do not feel at liberty to accept a note extending the time any further. We hope, if it is possible for you to do so, you will meet the note at maturity. If you cannot do this, by way of accommodating you as far as possible, we will, if you so request, recall your note from the bank where it now lies, and hold your renewal at this office as long as it may be possible to do so. You will understand, of course, that we are likely any day to be required to return it to the home office for cancellation, which we hope will not be necessary, however.

Yours truly, M. V. B. BULL & CO., *Managers.*

(Fols. 83–86.) F.

6. In reply to the last letter, Mr. Conway wrote a letter of which the following is a copy:

TROY, *April* 20, '92.

M. V. B. Bull & Co.

DEAR SIRS: Yours of the nineteenth duly received. I find I will be unable to pay note when it matures, and I hope you will

recall it from bank and hold it until I can meet it, which I will do as soon as possible.

Yours respectfully, WM. F. CONWAY,
(Fols. 170, 171.) 469 *River Street.*

171 7. The renewal receipt given to plaintiff's intestate, dated October 24, 1889, was (so far as it is material to consider it on this appeal), as follows:

Office of Phœnix Mutual Life Insurance Co.

HARTFORD, CONN., *October* 24, 1889.

Received $208.85 as per margin, the same being the premium due this day on policy No. 110,890, on the life of William F. Conway for $5,000. Said contract, with all its conditions, is hereby continued in force until the 24th day of October, 1890, and no longer. By the terms of the policy if the premium be not paid on or before the day when due, this policy will be forfeited; and no agent is authorized in any case to waive or postpone payment of premium, or to accept it after the date at which it falls due, without special permission from the president or secretary of the company.

CHAS. H. LAWRENCE, *Secretary.*

(Fols. 110–113.)

8. A similar receipt for 1890, which was offered in evidence, was precisely the same as the one for October 24, 1889, except as to date and amount. (Fol. 115.)

9. The only witness called for the plaintiff was Frank H. Fellows, who was the cashier and accountant in the Albany office. (Fol. 87.) He testified that he had no other dealing with Mr. Conway than with reference to this policy, that he knew of. He did not surrender the renewal receipt when the note given by Mr. Conway was received by him, but kept it. The understanding was that he was to deliver it to Conway when the note was paid. (Fols. 88, 89.) The note was received from Mr. Conway to apply on the renewal when the note was paid. It was given by reason of the premium that became due October 24, 1891. The firm of Bull & Co. held this note at their office and afterwards indorsed it and sent it for collection. They never had it discounted. They did not send it on to Hartford (where the home office of the defendant is located). It was never sent to Hartford. (Fol. 90.) The witness said that he had taken notes from other holders of policies and in precisely the same way. That they did *not* sometimes take a first-class
172 note as payment and surrender the premium receipt unless Mr. Bull or the firm chose to advance the money and pay the premium. The money in that case would be transferred to the company's account, and the firm in that case could do what they liked with the note; but that that was not done in this case. (Fol. 91.) He said that he had been accustomed to take notes merely to extend the time of the payment of the premiums, but that it had been done only in exceptional cases (fols. 92, 93); that he was not certain that they ever took any notes to extend the time of payment

of premiums during the last year; that some years ago there might have been thirty or forty notes taken in the course of a year, when that business was done more extensively than lately. (Fols. 94, 95.)

He said that when a premium was paid in cash, if paid in February, it would be reported in March; that if a check for a premium was received in October, it would appear in what was called the October report, which was made up as soon as possible after the closing of the business for October. (Fol. 97.) In such case, the report made in November would contain the name and number of the policy where the premium was paid in October. (Fol. 98.) That they remitted at the time of making the report, and in that way the home office was kept apprised continually of the premiums paid when due (fol. 99); that where a note was taken, the name would not appear upon the reports until the note was paid, but that the report would show when the premium was due; that is, if a two months' note was taken for a premium due in October and the note was paid in December, the January report would show the receipt of the premium in December, and also in another column that it was due in October (fol. 101); that that was the course which he had pursued with reference to the statements sent to the home office and with respect to premiums which were paid after they became due. (Fols. 101, 102.)

On his cross-examination, this witness testified that the signature to the typewritten letter (Plaintiff's Exhibit B) from M. V. B.
173 Bull & Co., to Conway, was in his handwriting, dictated by him and signed by him. He also testified that after the writing by him of this letter the note was recalled from the bank by the general agents and that the writing thereon in red ink "Returned from bank unpaid" was his; that the note had been sent to the Manufacturers' bank in Troy for collection. (Fol. 108.)

This witness also testified on his cross-examination that he did not remember personally the transaction with reference to the note of Mr. Conway of October 24, 1891. He did not know whether the arrangement was made by correspondence or a personal interview; that the renewal receipt for 1891 was sent to the office of the general agents with other renewal receipts at the same time, and was sent for delivery upon the payment of the premiums; that the renewals in the office, as near as he could estimate, would be from 300 to 400 a month; that in their reports to the company, they made no reports of anything except cash (folios 115, 116); that no report was ever made to the home office of the company at Hartford prior to the death of Mr. Conway of any note having been taken by Bull & Co., to the witness' knowledge; that the renewal receipts are issued from the home office; sent by them to the agents Bull & Co. in Albany, and by the agents delivered to the policy-holders upon the payment of the premium (fol. 117); that no report was ever made prior to Conway's death to the home office of any note having been taken from Conway, to his knowledge; that the witness made the reports; he thought he made the report in October, 1891, and had a copy of the report he made which he produced. (Fol. 118.)

Being asked to turn to the report for October, 1891, and look through and see whether the name of Mr. Conway appeared at all in that report, he answered that it should have appeared there, if at all, but it was erased; that is the name appears, the name "Conway" and "N. Y." under 110,890; the amount of the premium, the amount of the dividend, and the net amount of the premium, $202.35, and the commission, is erased; it was written but was erased by red ink; that that was the only name erased in
174 that report; that the error was a clerical error. The name should not have appeared there at all; was erased in the original report; that the one produced was a copy of the original report, erasures and all. (Fols. 119, 120.)

He also testified that the note in question was never sent to the home office, and so far as he had any knowledge or information, the home office was never informed of this note during Mr. Conway's life; that he never informed them (fol. 121); that he remembered a person coming to the office and claiming to represent the estate, and urging a settlement on the ground that they were ready to pay the premium, if it would be accepted; that this was subsequent to Mr. Conway's death; that proofs of death were presented the first of May, and that was the only time that any demand was made at their office; that was the only proffer of the premium so far as he knew; that at the time this demand or proffer was made, the renewal receipt had been returned to Hartford, the home office of the company. (Fol. 122.) He had heard of Mr. Conway's death before the renewal receipt was returned; that the premium which became due October 24, 1891, was never paid. (Fol. 122.)

On his redirect examination, in answer to a question, "Assuming that the error of putting Conway's name in there occurred in the original report, what would that line drawn through indicate?" His answer was, "Simply that it had been put in there by error; that is not an uncommon thing; it would indicate that the premium due then was not paid, although by an error, it had been put in." (Fol. 127.) At the request of plaintiff's counsel, the witness added up the column headed "Premium" and said that the footing at the bottom of the column excluded the amount of Conway's premium (fol. 127); that they did not remit to the home office for the premium, as though it were a cash payment (fol. 128); that application was made to the Albany office for proofs of death blanks, which were furnished to the same representative (fol. 129); that as soon as the general agents were satisfied that any collections could not be made, they returned the renewal receipt to the home office for cancellation. (Fols. 130, 131.)

175 The first premium receipt of October 24, 1887, was put in evidence by the plaintiff. (Fols. 132–135.)

The witness further testifies that they (meaning the general agents) always made an effort to collect if possible, the premium before returning the premium receipt; that it was the custom if they made the collection even though late, to accept it and surrender the premium receipt (fols. 135, 136); that when such delay occurred, whether for a few days or for a week or a month, it did not

appear upon the reports; that they treated a payment made during the month of December, for example, even though a few days late, as though paid when due (fol. 136); that that had been their custom for years; that where there was no promise to pay, and there had been no extension of time granted in the payment of the premium, they sometimes held the renewal receipt for several months without returning it (fol. 137); that the custom of the office was to send out reminders, from time to time, and urge the payment, and when it became evident that the collection could not be made, or that it was not the intention of the holder to continue his policy, to return the receipt. (Fol. 138.)

On his recross examination, the witness testified that if they learned that the party was dangerously ill, after the time had lapsed they would not receive payment and deliver; they were under instructions not to do so; that they judged of that as to whether it was a proper case; that the renewal receipts were received from Hartford (fol. 139); that Mr. Conway had never before October, 1891, given a note for a renewal, to his knowledge; that he had paid cash in all cases before. (Fol. 144.)

In answer to a question by plaintiff's counsel, this witness said that their instructions from the home office were not to receive a payment where the party was out of health and the renewal past due (fol. 145); that where they have granted indefinite extensions of time, the terms of which were not fixed, they were not to receive payment when they ascertained that the man was in poor
176 health; that that rule had been in vogue several years (fol. 146); but upon his recross-examination, by defendant's counsel, he said that he did not mean that they had any instructions or permission from the company to give an indefinite extension of time in any case or that they ever did give an indefinite extension of time for the payment of a premium; that the instruction that he referred to was with reference to whether they could take a premium after it became due; that they were prohibited from doing that, if they learned that the man was in poor health. (Fols. 147, 148.) That these instructions were given him through Mr. M. V. B. Bull, the agent in Albany, and that he had seen a letter from the home office in which they stated that in case of accepting a past-due premium it was necessary that they be assured that the party was in good health. (Fols. 149, 150.)

Witness also said in answer to a question of plaintiff's counsel, whether they had been in the habit of granting extensions of premiums due without any fixed limit of time that to the question in that form, he answered no. (Fols. 154, 155.) He said, in answer to the question, what sort of an extension they had been in the habit of granting, that policy-holders have been sometimes in the habit of obtaining extensions for themselves by failing to pay, without any agreement upon the subject. (Fols. 155, 156.) But in answer to the question "Have you never agreed to let the question stand a week where a man was perfectly good?" the witness said: "At his risk." In answer to the question "That is, if he died in the meantime?" he said: "Yes, sir, or his health failed in the meantime,"

but that if he continued well financially and physically they would at the end of the time agree to accept his money and give him his receipt. (Fol. 157.)

10. The death of the assured on the 8th day of May, 1892, is alleged in the complaint (fol. 8), and admitted in the answer (fols. 40, 41); also the service of proofs of death on the 30th of May, 1892. (Fols. 16, 51.)

177 11. After the plaintiff rested, the defendant gave in evidence an affidavit, made by Charles F. Gladding, a clerk of the defendant, residing at Hartford, Connecticut, that on the 31st day of August, 1891, he, in behalf of the company, duly addressed and mailed at the post-office in the city of Hartford, and paid the postage thereon, to William F. Conway, the person whose life was insured by the policy in question, at his place of residence in Troy, Rensselaer county, New York, a notice, of which the following is a copy:

"The Phœnix Mutual Life Insurance Co.

"HARTFORD, CONN., 8–31, 1891.

"The premium on policy No. 110,890 will become due October 24th, 1891, and if not paid the policy and all payments thereon will become forfeited and void, except as otherwise provided in the policy.

"CHARLES H. LAWRENCE, *Secretary.*

"The above notice is sent as required by chapter 341, 1876, and 321, 1877 of the Laws of New York. It is not to replace the usual itemized renewal notice (which is intended to be sent in due course, without responsibility for omission or miscarriage), nor to prevent payment through authorized agents." (Fols. 162, 163.)

This affidavit was offered and received under the provisions of chapter 321 of the Laws of 1877, amending chapter 341 of the Laws of 1876. It was received without objection.

Points of Appellant.

First. By the terms of the policy, irrespective of statutes and of the question of waiver, no recovery can be had against the defendant except upon its liability for four-twentieths of the amount of the policy.

1. The policy states "that if any subsequent premium hereon be not paid when due, and a separate receipt, signed by the president or secretary of this company, in each case given therefor, then this policy shall cease; but when, after three or more full years'

178 premium shall have been paid hereon, this policy shall cease for non-payment of any premium when due, then and thereafter this company shall be liable under this policy for a sum of non-participating paid-up insurance which shall be equal to as many twentieths of the amount of this policy as there shall have been paid full years' premiums hereon," etc. (Fols. 32–34.)

2. Under the latter part of the above clause, the defendant has

always conceded its liability to plaintiff under this policy for $1,000 and interest from the date of the proofs of death. (See fol. 61.) Defendant's motion to direct a verdict for $1,000 and interest (fol. 172); defendant's ninth request to the court. (Fol. 182.)

3. The language of the policy (the contract between the assured and the defendant), is clear; and unless there is something in the statutes of the State which enters into and changes it, or there has been some waiver of the terms of the policy by defendant, the plaintiff, her intestate having failed to pay the premium which became due October 24, 1891, is not entitled to any recovery beyond the sum to which the payment of four annual premiums entitles her, after the policy has ceased in consequence of the non-payment of a subsequent premium.

Second. There has been no waiver of the conditions of the policy.

1. "All agreements to be binding upon the company must be in writing and signed by its president or secretary." (Policy, fol. 31.)

2. "No agent or other person can alter, modify or waive any of the terms or conditions of the policy." (*Id.*, fol. 32.)

3. The case of Marvin *v.* The Universal Life Ins. Co. (85 N. Y., 278; affirming S. C., 16 Hun., 494), is conclusive against the claim of waiver made by the plaintiff here. In that case a waiver of the forfeiture was claimed. One Henkle was the general agent
179 of the company, through whom the policy was originally obtained, and by whom the payment of the first premium was extended, and who indorsed upon the policy in the hands of the insured a receipt for such first premium, signing his name as general agent. After the second premium had matured, and while it remained unpaid, Henkle declared, in the presence of the assured and the wife of the latter, that he had agreed to extend the time of payment and that the premium might be paid at any time before he, the agent, made his report to the company, and that if the money was ready by nine o'clock the next morning it would be time enough. Henkle came the next morning, the amount of the premium was offered to him; he declined to receive it because the assured was then sick and confined to his bed, but promised, in substance, that if the assured recovered, he, the agent, would receive it and keep the policy alive. The money was then handed to the wife, who put it in her bureau drawer.

Relying upon these facts and claiming that they proved a waiver of the forfeiture, the plaintiff rested her case. The defendant thereupon moved for a nonsuit. The grounds of the motion were, that the premium had not been paid as provided for in the policy, and that no waiver had been proved and that Henkle had no authority to waive payment. The motion was granted, the court putting the decision on the sole ground that there was no proof of a waiver of the payment due in April, except on condition that the assured should recover his health, and there was no proof that the condition ever happened. Judgment upon this decision was affirmed by the general term, 16 Hun., 494.

This court affirmed the judgment upon the nonsuit; not, how-

ever, upon the ground that it was put by the court below, declining to express an opinion upon that point; but upon the ground that the policy contained an express provision that any alteration or waiver of its conditions, "unless made at the head office and signed by an officer of said company, shall not be considered as valid." (P. 282.)

180 This court says:

The difficulty remains that he (the agent) was in that respect restricted, and his authority limited and curtailed by an express provision in the policy itself thus brought to the knowledge of the assured, and, therefore, had no power in and of himself, to waive the condition of payment or agree that it should be waived. (Pp. 282, 283.)

* * * * * * *

Here the policy in plain terms denied to any agent, local or general, the power to waive conditions; reserved that authority solely to the "head office," and some officer of the company there, and gave notice to the assured upon the face of his policy of the existence of this restriction. Henkle, therefore, had no power to waive payment. The assured perfectly well knew the fact. It was his own folly to rely, if he did so, upon the act of the unauthorized agent. This ground of the nonsuit was, therefore, well taken. (P. 283.)

4. The decision in the Marvin case has never been questioned, but has repeatedly been followed by this court.

(*a.*) In the case of Messelback *v.* Norman (122 N. Y., 578), which was an action upon a policy of fire insurance, the policy contained a clause that it should be void unless consent in writing is indorsed thereon by or on behalf of the society, if any building hereby insured becomes vacant or unoccupied. It appeared that the tenant occupying the property moved out, and the building remained unoccupied until it was destroyed by fire. Plaintiff's evidence was to the effect that she immediately notified defendant's agent, from whom she had received the policy, that the tenant had moved out, and that he said all right, and that he would stop and fix her policy so that it would be all right if the house was vacant. It was held that the agent had no power to waive the policy, and that no legal waiver had been shown and that plaintiff was not entitled to recover.

(*b.*) Weed *v.* London, etc., Fire Ins. Co. (116 N. Y., 106) was also an action upon a policy of fire insurance, and reliance was placed upon a waiver of forfeiture by an agent. The doctrine of the Marvin case was repeated, and it was held that no waiver had been

181 proved and that plaintiff could not recover. (See, also, Fowler *v.* Metropolitan Ins. Co., 116 N. Y., 389.)

(*c.*) In Quinlan *v.* Providence, etc., Ins. Co. (133 N. Y., 356), this court has again recognized and repeated the doctrine of the Marvin case. The court says in this case that an agent of an insurance company possesses only such powers as have been explicitly conferred upon him by the company, or such as third persons dealing with him as such agent, have a right to assume he possesses; and

that were restrictions upon the agent's authority appear in a policy, the insured is bound to take notice of them, and in the absence of evidence tending to show that his powers have been enlarged by the usage of the company, its course of business, or by consent express or implied, the policy must control, and the authority as limited, must be regarded as the measure of the agent's power.

It is said in this case, citing the case of Walsh *v.* Hartford Fire Ins. Co. (73 N. Y., 10), that it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. (P. 364.)

(*d.*) In O'Brien *v.* Prescott Ins. Co. (134 N. Y., 28), there was a provision in the policy (of fire insurance) that "no part of the policy could be waived, except in writing, signed by defendant's secretary." There was also a provision that the policy should become void if the premises insured became vacant without the written consent of the company indorsed thereon. The premises having become vacant, the insured informed the defendant's agent of the fact, and asked how it would be in case the buildings insured were burned, and was informed that it would be all right. The buildings were thereafter burned. It was held by the second division of this court, that the stipulation as to occupancy not having been performed or waived, the policy was void. The court say, that Mr. Hulsapple was the general agent of the defendant, and that, unless his powers were expressly limited and the insured had notice of the
182 limitation, he would be presumed to have had power to modify the contract, and to waive strict compliance with the conditions therein contained. But the court held that the provision in the policy that no part of it could be waived, except in writing, signed by the secretary, was a restriction upon the power of the general agent. The court say:

Assuming that the provision relating to written consent, if it stood alone, might be waived by an agent possessing general powers, such a result cannot follow when the power to waive is taken away from the agent and conferred upon the secretary only. By agreeing that the secretary alone could waive, the parties necessarily excluded the agent from exercising that power. The apparent authority of the agent was limited by a restriction in the body of the policy, assented to by the assured as a part of the contract, and possessing the same binding force as any other provision therein contained. * * * By accepting the policy he (the assured) assented to a limitation of the power of the agent. Having thus agreed, he was bound to know the extent of the limitation and act accordingly. Citing the cases of Walsh (73 N. Y., 5), and of Marvin (85 N. Y., 278). (Pp. 32, 33.)

5. None of the authorities relied upon by the plaintiff's counsel sustain the ruling of the court below.

(*a.*) In the Leslie case (63 N. Y., 27), the insurance company itself by its own act induced the assured to omit strict performance within the time limited, and the decision was put upon this ground.

(*b.*) In the Meyer case (73 N. Y., 562), the company had been in

the habit of notifying the assured of the amount to be paid. The assured could not tell this without notice, because he did not know the amount of dividend to be deducted. The company refused to inform him when inquiry was made what this amount was, and afterward refused to receive the premium. The court of appeals held that the policy was not forfeited and that the plaintiff was entitled to a judgment in equity declaring the policy to be existing and in full force.

(c.) In the Wyman case (119 N. Y., 274), which was against this defendant, the assured had written to the company asking
183 how large a paid-up policy it would give him in exchange for his existing policy. The company answered referring the assured to its agent in New York. The agent, upon the application of the son of the assured, advised a continuance of the existing policy and against substituting a paid-up policy, and suggested that the son should go home and talk the matter over with his father, and while negotiations were thus pending the assured died, and the court held that by the course of dealing between the parties, and the course of the company in referring him to the agent, the assured was justified in inferring that the general agent was armed with as much authority as the home office, and the plaintiff was held entitled to recover.

6. There can be no pretense here that, as in the Wyman case, the assured was misled by any act of the company. If, during the pendency of the negotiations and while the assured was in good health, the agents in Albany had accepted the premium and delivered to him the renewal receipt, the company might have been held liable. But the assured did *not* pay his note. At his request it was recalled by the agents from the bank where it had been sent for collection. It will be said that this was done by the assured in reliance upon the letter of the agents of April nineteenth, but this letter distinctly informs the assured that the agents were not authorized by the company to make any further extension. It says: "We hope, if it is possible for you to do so, you will meet the note at maturity. If you cannot do this, by way of accommodating you," etc., "we will, if you so request, recall your note from the bank," etc., "and hold your renewal at this office as long as it may be possible to do so." Then follows this significant sentence: "*You will understand, of course, that we are likely any day to be required to return it to the home office for cancellation*, which we hope will not be necessary, however."

Take this letter, in connection with the provision of the
184 policy, "that no agent or other person can alter, modify or waive any of the terms or conditions of this policy," and with the notice in the renewal receipt that "no agent is authorized in any case to waive or postpone payment of premium or to accept it after the date at which it falls due, without special permission from the president or secretary of the company," and it is clear that the assured had full notice that in neglecting to pay the note at maturity and at once to take up the renewal receipt, he acted at his own risk and not upon any act, contract or course of dealing

with the company upon which he had a right to rely under the doctrine of the cases above referred to.

The case is made stronger by the fact that in all previous years he had made his payments in cash, this being the first time that a note had been given or any delay extended to him. There was no "course of dealing" with the company by which he was misled. On the contrary, the plain intimation of Bull & Co.'s letter of April nineteenth was that his only safe course was to meet the note at maturity, and take up the renewal receipt.

In one of the cases relied upon by the claimant (Insurance Co. *v.* Wolff, 95 U. S., 326), while it was held that the company by the agent's receipt of the premium, waived the forfeiture for non-payment at the stipulated time, it was also held that it did not waive the forfeiture incurred by the residence of the assured within a district prohibited by the policy. It was held, therefore, that the company having tendered the return of the premium and demanded the surrender of its receipt, was not liable on the policy, even though the renewal receipt had been delivered by its agents.

In this case, the renewal receipt had not been delivered. It was not applied for until after the death of the assured. Of course, the agent would not then have been justified in delivering a renewal receipt by which a contract insuring for another year the life of a man who was already dead, would be made.

185 Third. The plaintiff is not aided by chapter 341 of 1876, as amended by chapter 321 of 1877.

This statute provides that no life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest or any portion thereof, except as thereinafter provided. It then provides that whenever any premium or interest due upon such policy shall remain unpaid, a written or printed notice stating the amount of such premium or interest, the place where it shall be paid, etc., shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of assignment has been given to the company, and that unless the said premium or interest then due shall be paid to the company or to a duly authorized agent within thirty days, the policy and all payments thereon will become forfeited and void. It is also provided "that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon, will become forfeited and void, served in the manner hereinbefore provided, at least thirty days and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

S. L., 1877, p. 342, ch. 321, § 1.

The second section of the act provides that the affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured in pursuance of said section, shall be presumptive evidence of such notice having been given.

It has been held that in the case of every policy of insurance issued in this State since the passage of this act, the provisions of this act are to be considered a part of the contract, and governing the rights and obligations of the parties as if all its terms and conditions were incorporated in the policy; and that where, in an action on the policy, there is no proof of the payment of the last premium falling due before the death of the insured, and no proof of the giving of the statutory notice, it is to be assumed that
186 the policy was in force at the time of the death of the insured, and that the obligation to pay upon death during the life of the policy was unimpaired, although the premium was unpaid, and that as the liability of the defendant was fixed by death, it was not necessary to pay or tender before suit brought, the premium due and unpaid, but that the unpaid premium and interest was simply a claim to be deducted by the defendant from the sum due upon the policy.

Baxter *v.* Brooklyn Life Ins. Co., 119 N. Y., 450.
Defrece *v.* National Life Ins. Co., 136 N. Y., 144.

In the Defrece case the company did not rely upon its policy. The policy required the payment of an annual premium. The company alleged a subsequent agreement by which the premium was to be paid quarterly instead of annually. It proved a notice given under the law of 1877, but it was held by two of the general term judges to be insufficient (46 N. Y. State Rep., 479, 484, 485), requiring the payment of a quarterly premium. But the same evidence which proved the payment of the premiums quarterly instead of annually, also proved that they had been received by the company after the day when they fell due. This was held by the court of appeals to be evidence of an agreement that the company would receive payment of the installments after they became due, if payment was made in a reasonable time thereafter, and would waive the right given them by the policy to declare it forfeited if punctual payment was not made. There is nothing, therefore, in that case, to sustain the judgment in this.

The only effect of the statute and of these decisions is to throw the burden of proof upon the defendant to show a forfeiture.

In other words the plaintiff had only to prove his policy and the death of the assured, and rest. The assumption would then be that no notice had been given, which under the provisions of the act of 1877, would work a forfeiture of the policy in case of non-payment.

187 But all that the defendant has to do is to prove (as it did in this case), that the notice provided for by the act of 1877 was actually given, and then to show the non-payment of the premium to which reference was made in the notice.

This being done, the case stands precisely as it would if there had been no such statute. The notice required having been given, the effect of non-payment is precisely the same as it would have been before the statute, and the question as to the waiver or forfeiture is governed by established principles, irrespective of the statute.

Fourth. There was no proof that any custom of taking notes or extending the time of payment by the agents was known to the defendant or its officers.

The learned judge who presided at the trial court decided this case, as will be seen from the language used by him, as a matter of impression, without opportunity for examination and with some hesitation. (See fols. 184, 197.)

He evidently had received a wrong impression in regard to the knowledge by the defendant of the course sometimes pursued by its agents in Albany.

On examining the evidence of Mr. Fellows it will appear that there is no evidence that the company ever had knowledge of the taking of notes. In some exceptional cases, not exceeding thirty or forty in the course of a year (fol. 95), although the renewals in the Albany office amounted to from 300 to 400 a month (fol. 116), notes were taken by the agents, but when taken they were not reported to the company. They were taken by the agents Bull & Co., as their own, and the renewal receipts were not delivered to the persons insured until the notes were paid, except in some few cases where the cash was advanced by the agents and the money paid to the company by them, the agents looking to the person to whom the loan was made. (See fol. 91.) In other words, in such cases the agents loaned the money to the person insured to pay the premium.

The most that can be said in regard to the knowledge of defendant is that they were apprised by the reports sometimes that
188 premiums which fell due during a given month were not paid, and the renewal receipt was not returned, and that afterwards it appeared that the premium was paid and the renewal receipt delivered. This simply shows that the company, in some case, assented to the agents accepting premiums and delivering the renewal receipt after the premium became due; but it does not appear that they knew of any agreement for the extension of time, or of any such extension in any other way than by accepting the money and delivering the renewal receipt after the premium became due. This renewal receipt as has been shown was an agreement signed by the secretary, and, therefore, was within the provision of the policy that all agreements to be binding on the company must be signed by its president or secretary. (Fol. 31.) It appears by Mr. Fellows' testimony that the instructions were not to deliver a renewal receipt where the payment was made after time, if the person insured was dangerously ill (fol. 139), or was in poor health. (Fol. 146.) He testified in answer to a question by plaintiff's counsel as to what sort of extension they had been in the habit of granting, that policy-holders had themselves been in the habit sometimes of obtaining extensions for themselves by failing to pay without any agreement on the subject; and that they would sometimes agree to let the question stand where a man was perfectly good at his risk, if he should die in the meantime, or his health failed; that if he continued well financially and physically, they would at the end of the time accept his money and give him his receipt. (Fols. 156, 157.)

Fifth. The court erred in admitting the question "to what extent have you been obliged to do that"? (At fol. 93.)

The ground of the objection stated at folio 93 was good, and the objection should have been sustained. The only purpose for which proof of custom has been permitted in order to vary the conditions of a policy, or other contract, has been that such custom has been acted upon by the other party to the contract, and that the defendant is thereby estopped. The evidence admitted in this case
189 was of transactions between the defendant and other parties, without any proof whatever that the assured had any knowledge of such custom, or was influenced thereby.

The admission of the evidence permitted dealings between the defendant and third parties, unknown to the assured, and which, therefore, could not have influenced him, to operate as a waiver of the terms of the contract.

Sixth. The requests to charge made by the defendant should have been complied with. (Fols. 173–182.)

1. The first three requests are practically covered by the foregoing points.

2. The fourth request (fol. 176) that even if the taking of the note by the agents, October 24, 1891, operated as an extension of the time of payment of the premium, such extension was conditioned upon the payment of the note on or before maturity, and the note not having been paid the condition of such extension failed, and the forfeiture was not waived, should have been charged. The note was received to apply on the renewal when the note was paid. (Fol. 89.) The note was never sent to the home office, nor was the home office informed of it. (Fol. 121.) It was not taken in payment, for if it had been, the renewal receipt would have been delivered. It was taken by the agents, to themselves, to apply if paid, on the premium due October 24, 1891. (Fol. 89.)

See Holly *v.* Metropolitan Life Ins. Co., 105 N. Y., 437.

3. The fifth and sixth requests should have been charged. As has already been shown the statement in the letter of April nineteenth that "We are likely any day to be required to return the renewal to the home office for cancellation," taken in connection with the terms of the policy, and of the renewal receipt of October 24, 1890, was notice to the assured that the writers had no power or authority to extend the time of payment of the premium. It was
190 equivalent to a statement, "In taking the course which you propose you act at your own risk. We have no authority to extend the time. The company can at any time require us to return the renewal. We are not undertaking to waive or change any provision of the policy."

4. The seventh proposition should have been charged. (Fols. 179, 180.) The request was in the language of the policy and of the renewal receipts, which had been given. (See fols. 30–32, 112, 115.)

5. The eighth request should have been complied with. (Fol. 181.)

The provision of the policy was that all agreements to be binding on the company must be in writing and signed by its president or secretary. (Fol. 31.) The renewal receipt was signed by the secretary. The old policy had ceased. The extension was a new contract which could be made only, in order to be binding on defendant, by a writing signed by its secretary.

6. The court should have charged in accordance with the ninth request, that plaintiff was entitled to a verdict of $1,040 against the defendant and no more. (Folio 182. See, also, motion at fol. 172.)

Seventh. The judgment appealed from should be reversed or modified as suggested by the trial judge at folio 196, by reducing the recovery to $1,040.

In case of a modification or reduction of the recovery, it would be necessary also to modify the judgment as to costs, as an offer was made under section 738 of the Code at the time of serving the answer. In any event, the costs of appeal both to the general term and to this court should be allowed to defendant, to be deducted from the amount of the recovery.

Albany, October 23, 1893.

HALE & BULKELEY,
Attorneys for Appellant.

MATTHEW HALE, *Of Counsel.*

191 Court of Appeals.

ANNA V. CONWAY, as Administratrix, etc., of William F. Conway, Deceased, Respondent,
against
THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

BRIEF FOR RESPONDENT.

Statement.

The defendant appeals from a judgment entered upon an order of the general term, of the third department, affirming a judgment entered March 1st, 1893, in Rensselaer county, for $4,986.52 and costs, entered upon a verdict of a jury directed by the court. The judgment of affirmance (fol. 211) was entered May 11th, 1893.

Facts.

The plaintiff brought an action against the defendant on a policy of life insurance issued to the plaintiff's intestate for $5,000. The defendant refused to pay upon the ground that the policy
192 had lapsed by reason of the non-payment of the premium due October 24, 1891. The policy was issued (fol. 25) October 24th, 1887. The annual premium was $239.35, payable October 24th each year. By its terms it is payable to the legal representatives of the assured within thirty days after satisfactory proof of his death, or it is payable to the insured twenty years after its

issuance, in case the insured is then living. The policy contains this clause (fol. 32):

"That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the insured, and that if any subsequent premium hereon be not paid when due, and a separate receipt signed by the president or secretary of this company, in each case given therefor, then this policy shall cease."

Also this clause (fol. 31):

"That all permits for residence, travel or occupation, which may be granted, and all other agreements, to be binding on this company, must be in writing and signed by its president or secretary, and that no agent or other person can alter, modify or waive any of the terms or conditions of this policy."

Plaintiff's intestate paid the annual premiums each year down through the year 1890. When the annual premium due October 24th, 1891, became due he executed a note in the following form (fol. 44):

"202.35. TROY, *October 24th*, 1891.

Six months after date I promise to pay to the order of M. V. B. Bull & Co. two hundred two 35/100 dollars, at Manufacturers' nat. bank, with interest, value received.

W. F. CONWAY."

193 Said M. V. B. Bull & Co. were the general agents of the company within the State of New York (fol. 43), and upon their letter-heads they represented themselves also to be managers (fol. 83), and so subscribed themselves (fol. 86).

The company had issued a renewal receipt for this premium, which was the amount of the premium less the annual rebate, but did not deliver it to Mr. Conway, but it was held by Bull & Co. (fol. 116). Just before the note matured, on the 18th of April, Mr. Conway wrote to Bull & Co. as follows (fol. 104):

"You have a note of mine due on the 27th, which I find I will be unable to pay. I would like to have it renewed for three months and feel I will be able to meet it then. I will send you check for interest as soon as I hear from you."

To this letter Bull & Co. replied April 19th, 1892 (fol. 84), as follows:

"In reply to your favor of the 18th, your renewal has remained unpaid since October last, pending the maturity of your note, and we do not feel at liberty to accept a note extending the time any further. We hope, if it is possible for you to do so, you will meet the note at maturity. If you cannot do this, by way of accommodating you as far as possible, we will, if you so request, recall your note from the bank where it now lies, and hold your renewal at this office as long as it may be possible to do so. You will understand, of course, that we are likely any day to be required to return it to the home office for cancellation, which we hope will not be necessary, however.

Yours truly, M. V. B. BULL & CO."

194 On the 20th of April Mr. Conway answered this letter as follows (fol. 170):

"Yours of the 19th duly rec. I find I will be unable to pay note when it matures, and I hope you will recall it from the bank and hold it until I can meet it, which I will do as soon as possible."

Bull & Company thereafter recalled the note from the bank (it was not protested) and also held the renewal receipt and did not return it to the home office.

On the 18th day after this last letter was written, to wit: May 8th, 1892, William F. Conway died, leaving a widow and next of kin (fols. 8 and 41).

The important facts bearing on the question of waiver will be stated under point II.

Points.

I.

The verdict stands as a general verdict rendered by the jury.

Each party having asked the court to direct a verdict (fol. 172), the verdict has the same force as though the case were submitted to the jury. While there are no disputed facts in the case at bar, yet possibly different inferences might be drawn as to whether there was a waiver by the company of the provision in the policy as to the payment of premiums. This makes pertinent the above principle.

See:

Sutter *vs.* Vanderveer, 122 N. Y., 653.
Dillon *vs.* Cockcroft, 90 N. Y., 649.

195 The defendant may not now insist that any question of fact should have been left to the jury.

Provost *vs.* McEncroe, 102 N. Y., 650.

II.

The general agents, M. V. B. Bull & Co., as matter of fact, had authority to extend the time for the payment of the premium.

I shall discuss this question without respect to the construction of the policy, in the light of technical rules governing the power of general agents. It ought to be said, however, at the outset that the plaintiff is not unmindful of the force of the rule as stated in Marvin *vs.* Universal Life Insurance Co. (85 N. Y., 278), but that that case will be considered as authoritative. So no re-examination of the questions involved in that case will be asked. The rule as therein stated is substantially that the power of a general agent is co-extensive with the business entrusted to his care: but will be narrowed by limitations communicated to the person with whom he deals. *But that case does not hold that alleged limitations stated in a policy which in fact do not exist shall be available to defeat a policy.*

This case presents a general agent who actually has the power to extend the time for the payment of premiums. He has used such power for years and his acts are known and approved and ratified

by his company. He pretends to have such authority and a policy-holder relying upon his good faith allows the time for the payment of a premium to pass. The policy is deemed by the company to be still in force. They wait for him to pay the premium. Before paying he dies. Then the company exclaims "Forfeited! our agent had no power. Is it not so written in the contract?"

196 Let me call the court's attention to the facts of this case, which show that the agents in the case at bar not only had the power conferred upon them as general agents, which might be limited under certain circumstances, but they had distinct and special authority conferred upon them by the company to extend the time for the payment of premiums. They had exercised this power for years and had done it with the knowledge of the home officers. Moreover, the fact that an extension was given to William F. Conway was known to the home office. Thus the case at bar was brought directly within the line of cases that are not at all in conflict with the Marvin case, but that affirm a doctrine quite as well established as the doctrine in the Marvin case. It is a doctrine which has its foundation in equity. It declares that forfeitures are not favored; that fair dealing is to be encouraged; and that a party to a contract acting honestly upon the strength of representations made by the other party shall be protected.

I shall quote from a few cases. See Norton *vs.* Knickerbocker Life Ins. Co., (96 U. S., 234). In that case a note was given for a premium and the note was not paid. The note contained a clause declaring that if not paid at maturity the policy would be void. There was testimony in the case tending to show that the company had allowed their agent to extend the time for the payment of premium notes. The court held that the company might have insisted upon the terms of its contract and the notes, but that it had the right, as a party always has the right, to waive any condition or stipulation in its own favor. The contract provided that agents of the company were not authorized to make, alter or abrogate contracts, or waive forfeitures. But the *fact* was that agents did that very thing with full knowledge of the officers of the company.

197 The court say: "That it did authorize its agents to take notes instead of money, for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority and always ratified their acts, notwithstanding the language of the written instruments."

Again it is held in the same case that it is immaterial whether the extension is applied for before or after the note matured; that is to say, whether the forfeiture had been incurred or not.

The court say: "If the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon

the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass; whereas if the indulgence is asked after the forfeiture it is a recognition on the part of the company of the continuance of the policy, and that the forfeiture has been waived."

In view of the language of that case it is not too severe to say that the defendant here is insisting that it had a legal right to commit a fraud upon the plaintiff's intestate.

Again that case proceeds: "Forfeitures are not favored in the law. * * * It is true we held in Statham's case that, in life insurance, time of payment is material, and cannot be extended
198 by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

Again, see the case of Life Insurance Co. *vs.* Eggleston, 96 U. S., 572. I quote a single paragraph from that case:

"Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not be sufficient unless sanctioned by the company itself. But where the latter has by its course of action ratified such declarations, representations or acts, the case is very different."

See also Kenyon *vs.* K. T. Assoc'n, 122 N. Y., 247.

Again, in the case of Wyman *v.* Phœnix Mutual Life Insurance Company, 119 N. Y., 274 (the same defendant as in this case), this court held that the facts of that case were sufficient to justify the conclusion that a general agent of the company had in fact special authority to extend the time of payment of premiums, and that the plaintiff might recover even though the policy in terms provided that no agent had the power to waive or postpone the payment of premiums.

In Messelbach *vs.* Norman, 122 N. Y., 583, the court say:
199 "Under a policy containing a provision that the insurer shall not be bound, etc., the power can only be exercised in the mode prescribed, *unless it is shown that the agent possessed, actually or apparently, the power of his principal in respect to the provision alleged to have been waived.*"

Thus it is clear that no one can question the rule of law; but the court will ask whether the facts of the case at bar make pertinent a reference to these decisions. They do most satisfactorily. I shall briefly refer to the facts:

Bull & Company were general agents of the defendant, and their authority as general agents was never limited by any resolution of the board of directors of the defendant or by any act of the defend-

ant other than appears from the policy and the renewal receipts which are sent for delivery to the agents. There was no formal act of limitation (fol. 81).

Frank H. Fellows swore that he was cashier and accountant in the Albany office of the Phœnix Mutual Life Insurance Co.; that he was employed by the defendant. He had the renewal receipt at the time the note was given by Mr. Conway. The understanding was to deliver it to Conway when the note was paid (fol. 89). The note was a six months' note, dated October 24th, 1891. He had taken notes from other holders of policies during his connection with the company in precisely this way (fol. 90). He had been accustomed to take notes merely to extend the time of payment of the premiums. There were as many as thirty or forty notes taken in the course of one year (fol. 95).

200 *Proof that the Company Knew These Facts and Ratified the Acts.*

Assuming that Bull & Company were not the company, and that knowledge in the cashier and accountant and themselves was not knowledge in the company, there is evidence which is perfectly conclusive that the officers of the company at the home office knew of this custom and ratified it. The proof is this:

A cash premium paid was reported to the home office one month later (fol. 96), or rather within one month after the payment. That is, a premium paid in October was reported to the home office in what is called the "October report," made as soon as possible after closing the business for October (fol. 97). The report made contains the following information (fol. 25): The name of the insured; the State; the month when premium is due; the amount of premium; the amount of dividend; and then a column headed "How paid."

The policy is thus described, so that at the home office they may turn in their books to the particular policy at once (fol. 99). A remittance is made by Bull & Company at the time of making the report, and in that way the home office is kept apprised continually of the premiums paid when due. In case a note is taken by Bull & Company for the premium the insured's name is omitted from the list until the note is paid. Then when the note is paid the reports show that while the premium was due in a certain month it was not paid until several months later, depending upon the length of the note (fol. 101). That was the course that had been pursued by Bull & Company with respect to these notes.

201 *Proof that the Home Office Knew that an Extension of Time was Given in This Particular Case.*

Conway's premium was due in October. The renewal receipt, signed by the home officers, was sent to Bull & Company (fol. 116). The subsequent reports made to the company did not show any payment made by Conway. When the October report was made the home office's attention was especially called to the Conway

case, because by an error the October report contained Conway's name, the number of his policy, the net amount of his premium and the commission (fol. 119). This would have indicated that the premium was paid in cash by him. Upon the original report sent to the home office this line, containing Conway's name, etc., was cancelled by a red-ink line drawn through it. A corresponding erasure was made in the copy of the report kept by Bull & Company (fols. 119, 120 and 126).

Thus the attention of the home office was directed especially to the Conway case when the October report was received. The renewal receipt was not returned to the home office until after the witness had heard of Conway's death (fol. 123). The home office knew that the renewal receipt was outstanding uncancelled; that the policy, in other words, was still in force, although Conway had not paid his premium in cash. The home office permitted this to continue.

It had been the custom of Bull & Company to retain renewal receipts and not to send them to the home office for cancellation until after they were satisfied that the premium could not be collected, even though it was past due (fols. 130 and 131). It
202 has been their custom to make a collection even though they make it late; to accept it and surrender the premium receipt (fols. 133 and 136).

Furthermore, Fellows swears as follows:

"Where there is no promise to pay, and there has been no extension of time granted in the payment of premiums, we hold a renewal receipt for several months without returning it. The custom of the office is to send out reminders from time to time and urge payment. When it becomes evident that the collection cannot be made the receipt is returned, or when it becomes evident that it is not the intention of the holder to continue the policy. When we find that out we return it at once and do not thereafter hold the premium receipt" (fol. 137).

But what is still more striking is that Bull & Company had special instructions from the home office with respect to collecting past-due premiums.

Fellows swore: "Our instructions were not to receive a payment *where the party was out of health* and the renewal past due" (fol. 145). Again, "Our instructions from the home office are that where we have granted indefinite extensions of time, the terms of which are not fixed, we are not to receive payment when we ascertain that the man is in poor health (fol. 146). That rule has been in vogue for several years."

Then this testimony was given:

Q. You can't do that where the terms of the extension are fixed, as in the case of a note?

A. Of course, if a note, that is supposed to fix the terms for the life of the note" (fol. 147).

The witness then attempted to modify his testimony somewhat; but the court will see that upon direct examination the cor-
203 rect impression was given, for he says at fol. 150, "I have seen a letter in which they stated" (referring to the home

office) "that in case of accepting a past-due premium it is necessary that we be assured that the party was in good health."

"And again, policy-holders have sometimes been in the habit of getting extensions for themselves by failing to pay without any agreement on the subject. We have agreed to let the question stand a week where the man was perfectly good at his risk. If he continued well financially and physically we would at the end of the time agree to accept his money and give him his receipt" (fol. 156).

It will thus be seen that when Bull & Company on April 19th, 1892, wrote to Mr. Conway (fol. 84) that if he was unable to meet his note at maturity he might be accommodated by allowing the note to remain unpaid until he could meet it, Bull & Company were not exceeding their authority, but were acting expressly within the authority actually conferred upon them by the home office and in accordance with the rule of procedure that had been in vogue for many years. They cautioned him, it is true, in the letter that they might any day be required to return the premium; that they might, in other words, at any time, upon notice, claim a forfeiture of the policy; but the fact is they did nothing of the kind, and when Conway died, therefore, this policy was in force and the liability of the defendant became fixed thereunder.

III.

A notice contained in a policy of a limitation put upon the power of a general agent does not limit his authority.

204 The purpose of words of limitation in a policy is to give notice to the policy-holder of such restriction; for a secret restriction placed on the power of a general agent cannot be used by the principal to defeat a claim based upon an act, apparently within the scope of the agent's power. There must exist in addition to such limitation notice to the insured. But it is equally true that notice of a limitation will not alone defeat a claim based upon an act of an agent within his professed authority. There must in addition exist as matter of fact such limitation. In such a case, one dealing with an agent who professes to have an authority denied to him in the written contract, takes the risk of being deceived by the agent. This is of course elementary. Some cases cited under my last point recognize this principle.

See Messelbach *vs.* Norman, 122 N. Y., 583.
Norton *vs.* Knickerbocker Ins. Co., 96 U. S., 234.

In other words, the limitation of an agent's power is not made by the contract between the company and its policy-holder any more than is the agent's authority created by a writing between the principal and a stranger. The principal may be estopped from denying that his agent has the represented power; but such estoppel becomes necessary because the law recognizes the fact that a principal may falsely state that an agent has a power which he in fact has not. A general agent is created by an act of the principal and the agent. The power is conferred directly. Having conferred such power, it

can only be taken away by some act of the principal. The powers of a general agent not specially limited are known, and have been recognized and declared by the courts. If a company then wishes to curtail such agent's power, it must do it by some affirmative act upon or declaration to the agent. It cannot be done by a
205 contract between the principal and a stranger. This brings into importance the fact admitted (folio 81), that the authority of Bull & Company was not limited by any resolution of the board of directors of the defendant, *or by any act of the defendant*, other than appears from the policy and the renewal receipts.

IV.

If the policy was in force on the day Conway died then it was not necessary that the premium should thereafter be paid or tendered.

This question was not raised at the trial. (See fol. 172, *et seq.*) That is a sufficient answer to the point; and moreover, even if raised it is not sound.

If a contract of insurance continues, either by a waiver of forfeiture or by failure to give the statutory notice, then the contract is a subsisting one, and it is not necessary that any tender of the premium should be made, but it may be deducted from the verdict as was done in this case (fol. 172).

Baxter *vs.* B. & I. Co. (119 N. Y., 456). An older case, held that an offer to pay was sufficient; that a tender was not necessary. An offer to pay was made in this case about the 31st day of May (fols. 122, 128, 129, and 130).

Meyer *vs.* Knickerbocker Life Ins. Co., 73 N. Y., 516.

V.

The agents having power to accept the note also had power to extend the time of payment of the note. The policy was in force when the plaintiff's intestate died.

206 It may be claimed that although the agents had power to accept the note, they had no power to extend the time for its payment. I do not see how that can be reasonably urged. The powers are similar; they affect the same subject-matter, and produce precisely the same results, to wit: to extend the time of payment of the premium and to waive a forfeiture. Moreover, accepting the note extended the time of payment of the premium, so that the premium did not become due until the note matured, which was six months from October. This made the notice served by the company August 31, 1891 (fol. 162), of no avail. The premium became due when the note matured and the company failed to serve any notice either before or after the note matured, within the time required by the statute.

Laws of 1877, chap. 321. (See fol. 52, *et seq.*)

See also De Frece *vs.* National Ins. Co., 136 N. Y., 144.

VI.

The agreement made to accept the premium after it became due by the terms of the policy, made after the policy was issued, was valid.

I should not think of referring to so well settled a doctrine were it not that I apprehend that my learned opponent will cite a case as though it held a contrary doctrine. The above principle is recognized and laid down in the case of—

Howell *v.* Knickerbocker Life Ins. Co., 44 N. Y., 276.

The case of Fowler *v.* Metropolitan Life Ins. Co. (116 N. Y., 389) is not at all in conflict with that case. It distinguishes it in this particular: In the Fowler case the agreement to extend the
207 time for the payment of premiums was in the form of a circular issued before the policy was made; and hence the court held that all previous negotiations, representations and agreements became merged in the policy, which by its terms provided for a forfeiture in case of failure promptly to pay the premium. Judge Brown in writing the opinion expressly calls attention to the fact that in the Howell case the agreement was made *at the time the insurance was effected, and thereafter;* in other words, a new contract was made for which there was a sufficient consideration. See also—

Boehen *v.* Williamsburg Ins. Co., 35 N. Y., 131.

VII.

The alleged words of limitation of the policy in question differ from those in the Marvin case, and under the authorities the plaintiff may recover without evidence of special authority conferred upon the general agents to waive forfeitures.

The policy in suit provides that all permits for residence, etc., and all other agreements, to be binding on the company, must be in writing and signed by its president or secretary, and that no agent or other person can alter, modify or waive any of the terms or conditions of the policy.

I claim that this does not restrict the powers of a general agent, but that such general agent may waive such condition itself; and without discussing the question I will refer briefly to some authorities on the subject.

A general agent may waive the provision that no insurance shall be considered as binding until actual payment of the premium.

Sheldon *vs.* Atlantic Fire and Marine Ins. Co., 26 N. Y., 460.

208 Again, a notice to policy-holders printed on the back of the policy, that payments to agents will not be deemed valid, etc., cannot be construed as a limitation of a general agent.

McNeilly *vs.* Continental Life Ins. Co., 66 N. Y., 29.

Under this authority the notices printed on the renewal slips, to the effect that no agent is authorized in any case to waive or postpone the payment of premium, or to accept it after the date on

which it falls due without special permission of the president or secretary of the company (fol. 112), cannot be construed to be a limitation of the power of the general agent. Such notice was not contained in the first premium receipt issued (see fol. 132), and of course the plaintiff's intestate was powerless to prevent the company from incorporating anything it might choose in the receipts thereafter given for premiums paid. Moreover, a clause to the effect that agents are not authorized to make, alter or discharge contracts, waive forfeitures, or bind the company in any way whatever, is held not to apply to general agents, but they have the power to waive a provision of the policy forfeiting it in case of non-payment of a premium at the time specified.

Marcus *vs.* Life Ins. Co., 68 N. Y., 626.

Again, a general agent may waive a provision in a policy that no condition of the policy could be waived except by a writing signed by the secretary.

Carroll *v.* Charter Oak Insurance Co. (10 Abb., N. S., 166.) Court of appeals, June term, 1868.

The clause in the policy in that case is certainly as favorable to the defendant as the one in suit. It is:

"And no condition of the policy can be waived except in writing signed by the secretary."

209 It is held in that case that a general agent had the right to modify that provision by a valid parol agreement, duly executed.

Again, it is held that a general agent may waive a provision that no condition or restriction of the policy should be waived except by an express agreement in writing signed by an officer of the company.

Van Allen *v.* Farmers' Joint Stock Ins. Co., 10 Hun., 397. Affirmed on the opinion of the court below, 72 N. Y., 604.

Again, "The power of a general agent is plenary as to the terms and conditions of the contract, and he may make such memoranda, etc., as in his discretion may seem proper." This case also decides what of course cannot be questioned, that although parties may make a contract and provide that neither of them may change it or vary it, nevertheless they may subsequently modify that very provision.

Pechner *v.* Phœnix Ins. Co., 65 N. Y., 204, 208.

There are many other cases holding that the power of a general agent is practically unlimited; but they are not cases in which there was any attempt in the policy itself to give notice of a limitation on their authority, and therefore they need not be referred to.

VIII.

The defendant had no idea of claiming a forfeiture in the case at bar until it learned of Conway's death. On the day of his death they would have accepted the premium had he been in good health.

Up to that time there had been nothing done or said which
210 led Conway to suppose that he must pay immediately the premium that was past due or a forfeiture would be claimed. Had such a position been taken by the defendant, it is fair to suppose that he would have made greater efforts to raise the money and pay it. It strikes me as grossly unfair that the defendant should be permitted thus to assure Conway that no forfeiture would be insisted upon by reason of the past failure to pay the premium, and thus necessarily lull him into a feeling of security, and make him less active and diligent in raising money to keep his policy alive, and then after his death claim that there was a forfeiture which it had expressly waived during his life. For the delay in paying the premium cost the company nothing; it did not do anything and nothing was done to it which in any way affected it by reason of Conway's failure to pay. It can therefore find no equitable grounds on which to place its present defense, but must resort to principles which I most respectfully submit have no application to the case; for they never arose out of injustice or bad faith, and have never been applied to work gross injustice or to legalize an evident fraud.

It is respectfully submitted that the judgment be affirmed.

G. B. WELLINGTON,
Of Respondent's Counsel.

211 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

LOUISA BANHOLZER, Plaintiff,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant. }

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto:

First. That the printed record in the case of "Anna V. Conway, executrix, *vs.* Phœnix Mutual Life Insurance Company," the report of the decision whereof by the court of appeals of the State of New York is contained in the 140th New York Reports, on pages 79 to 86, and the printed briefs of counsel in said Conway case, which were handed to and considered by the supreme court of said State of Minnesota upon re-argument of first appeal had in said action above entitled and which are attached hereto, shall in all future proceedings in this action, whether in this court upon appeal to the supreme court of said State of Minnesota or upon writ of error to said court from the Supreme Court of the United States, be taken and considered as a part of the record of this action with the same force and effect as if the same had been incorporated in the case heretofore settled in this court and as if the same had been introduced and considered in evidence upon the original trial of this action, and that the same shall be certified upon appeal to said supreme court of Minnesota and upon writ of error, if any, to said

supreme court of Minnesota from said Supreme Court of the United States as if the same had originally been a part of said case.

212 Second. It is further stipulated and agreed that the appeal from the judgment of said district court of Ramsey county, above named, to said supreme court of Minnesota, which said plaintiff purposes to take, may be taken without further notice to said defendant or its counsel, and that said appeal may be placed upon the April, 1899, general term, calendar of said supreme court for hearing and decision.

Third. That upon appeal to said supreme court of Minnesota it shall not be necessary for said plaintiff to print or cause to be printed any part of the return to said supreme court, all benefits of the rule of said court in that behalf being hereby expressly waived.

Fourth. It is further expressly stipulated and agreed that neither of the counsel for the respective parties hereto need prepare briefs upon the hearing in said supreme court of Minnesota, and that no argument shall be made or submitted by any counsel herein, but that said appeal shall be heard and disposed of by said supreme court without argument; provided, however, that this stipulation shall not in any manner or respect be taken to concede the jurisdiction of said Supreme Court of the United States to entertain said writ of error or to review the decision of the supreme court of Minnesota.

April 3, 1899.

C. D. & THOS. D. O'BRIEN, *Att'ys for Pl'ff.*
FLANDRAU, SQUIRES & CUTCHEON,
Att'ys for Def't.

213 [Endorsed:] District court, county of Ramsey. Louisa Banholzer, plaintiff, *vs.* New York Life Insurance Co., defendant. Stipulation as to return. Filed Apr. 5, 1899. Edward G. Rogers, clerk, by A. J. Stobbart, deputy. Flandrau, Squires & Cutcheon, attorneys, St. Paul, Minn.

214 *Mandate.*

STATE OF MINNESOTA, *ss:*

Supreme Court.

The State of Minnesota to the hon. judge and officers of the district court of the second judicial district, sitting within and for the county of Ramsey, Greeting:

Whereas lately in your court, in an action therein pending, wherein Louisa Banholzer was plaintiff and New York Life Insurance Company defendant, a certain order was entered therein April 30, 1898, from which order said plaintiff appealed to this court;

And whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1898, of our supreme court; after mature deliberation thereupon had, our supreme court did adjudge, determine, decree, and order "that the order of the court below,

herein appealed from, be. and the same hereby is, in all things affirmed, and that the respondent, defendant above named, have judgment accordingly;" a copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur:

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. Charles M. Start, chief justice of the supreme court aforesaid, and the seal of said court, at St. Paul, this third day of February, A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court.

215 [Endorsed:] Supreme court, State of Minnesota. Mandate to the district court of Ramsey county. Louisa Banholzer, appellant, against New York Life Ins. Co., respondent.

Endorsed: Filed February 6th, 1899. Edward G. Rogers, clerk, by G. A. Limberg, deputy.

216 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Defendant's Costs and Disbursements.

Statute costs	$10.00
Sheriff's fees for serving subpœnas	2.05
2 affidavits	.50
Notary's fees taking depositions in New York	18.36
Witness fees:	
J. A. Campbell, 1 day, 2 miles	1.12
G. C. Waller, 1 day, 2 miles	1.12
J. J. Parker, 1 day, 2 miles	1.12
F. G. B. Woodruff, 1 day, 2 miles	1.12
Edwin Mott, 2 days, 2 miles	2.12
Clerk's fees (to be taxed)	4.00
	$41.51

I hereby tax the costs and disbursements in this action at $41.51, no one opposing, this 8th day of Feb., 1899.

EDWARD G. ROGERS, *Clerk*,
By G. A. LIMBERG, *Deputy Clerk*.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

George C. Squires, being first duly sworn, says that he is one of the attorneys of the defendant in the above-entitled action; that the foregoing is a true and correct statement of the costs and
217 disbursements of said defendant therein; that all of the items of such disbursements have been actually and necessarily paid or incurred therein by and on behalf of said defendant; that each of the witnesses above named attended on the trial of said action the number of days and travelled, in going to and from their places of residence in St. Paul, in said county, to the place of trial of said action, the number of miles respectively above stated.

GEO. C. SQUIRES.

Subscribed and sworn to before me this 6th day of February, 1899.

JAMES H. SIMPSON,
Notary Public, Ramsey County, Minnesota.

[NOTARIAL SEAL.]

Messrs. C. D. & Thos. D. O'Brien, attorneys for plaintiff.

GENTLEMEN: Please take notice that the costs and disbursements of the defendant in the foregoing entitled action will be taxed by and before the clerk of said district court, at his office in the court-house at St. Paul, Minnesota, on Wednesday, the 8th day of February, 1899, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements which will then and there be claimed on behalf of said defendant and inserted in the judgment in said action then and there to be entered.

Respectfully,
FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

218 [Endorsed:] Copy. 7188. District court, county of Ramsey. Louisa Banholzer, plaintiff, *vs.* New York Life Insurance Co., defendant. Affidavit of disbursements and notice of taxation of costs. Filed Feb. 8, 1899. Edward G. Rogers, clerk, by G. A. Limberg, deputy. Flandrau, Squires and Cutcheon, attorneys, St. Paul, Minn.

219 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } No. 71882.

Pursuant to the order of court duly made and entered in the above-entitled action on the 7th day of April, A. D. 1898—

Now, on motion of Messrs. Flandrau, Squires & Cutcheon, said attorneys, it is hereby adjudged that the above-entitled action be, and the same hereby is, dismissed, and that the defendant herein recover of said plaintiff, Louisa Banholzer, the sum of forty-one and $\frac{51}{100}$ dollars, costs and disbursements.

Signed this 8th day of February, A. D. 1899.

EDWARD G. ROGERS, *Clerk.*

Endorsed: Judgment-roll. Filed 8th day of February, A. D. 1899. Edward G. Rogers, clerk, by G. A. Limberg, deputy clerk.

220 STATE OF MINNESOTA, } ss:
County of Ramsey, }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, a Corporation, Defendant. } Notice of Appeal.

To Messrs. Flandrau, Squires & Cutcheon, attorneys for the above-named defendant, and Edward G. Rogers, clerk of said district court:

Please to take notice that the above-named plaintiff appeal- to the supreme court of the State of Minnesota from the judgment of the said district court entered herein and docketed in the office of the clerk of said court on the 8th day of February, 1899, in favor of the said defendant and against the said plaintiff for the dismissal of said action and for the sum of forty-one and $\frac{51}{100}$ths dollars.

Dated this twenty-fifth day of March, 1899.

C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff, St. Paul, Minn.

Endorsed: 71882. District court, county of Ramsey. Louisa Banholzer *vs.* N. Y. Life Ins. Co. Notice of appeal. Due service of the within notice is hereby admitted, at St. Paul, Minnesota, this 3rd day of April, A. D. 1899. Flandrau, Squires & Cutcheon, attorneys for defendant. Edward G. Rogers, clerk district court. C. D. & Thos. D. O'Brien, attorneys for plaintiff, St. Paul, Minn., Globe bldg. Filed Apr. 4, 1899. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

221 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Corporation, Defendant. } Undertaking on Appeal.

Whereas judgment was recovered in the district court of the county of Ramsey on the 8th day of February, 1899, by the above-named defendant for the dismissal of said action and the sum of forty-one and $\frac{51}{100}$ dollars ($41.51) against the above-named plaintiff, and the said plaintiff has appealed to the supreme court of this State from such judgment:

Now, therefore, we, Thomas A. Prendergast and P. M. Hennessey, of St. Paul, Minnesota, do undertake and bind ourselves in the sum of two hundred and fifty dollars ($250.00) that the said Louisa Banholzer, said plaintiff, will pay or cause to be paid all costs and charges which may be awarded against her on said appeal.

Dated this 30 day of March, A. D. 1899.

THOS. A. PRENDERGAST. [SEAL.]
P. M. HENNESSY. [SEAL.]

C. D. O'BRIEN,
S. M. SOULE,
Witnesses.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

Thos. A. Prendergast and P. M. Hennessy, of St. Paul, Minnesota, the persons named in and who executed the foregoing undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of five hundred dollars ($500.00) over and above his just debts and liabilities and exclusive of his property exempt from execution.

THOS. A. PRENDERGAST.
P. M. HENNESSY.

Subscribed and sworn to before me this 30th day of March, A. D. 1899.

C. D. O'BRIEN,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

222 The foregoing undertaking on appeal is hereby in all respects approved.

Saint Paul, Minnesota, March 3rd, 1899.

OLIN B. LEWIS,
District Judge, Second Judicial District.

Endorsed: 71882. Due service admitted this 3rd day of April, 1899. Flandrau, Squires and Cutcheon, attorneys for def't. Filed April 4, 1899. Edward G. Rogers, clerk, by G. A. Johnson, deputy.

223 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Upon the annexed stipulation between counsel for the respective parties to the above-entitled cause, it is—

Ordered that the printed copies of said return and briefs of counsel, with the stipulation thereto attached, described in said stipulation, need not be kept on file in the office of the clerk of this court, but said clerk is hereby authorized to attach the same to and make it a part of his return to the supreme court upon the appeal of said plaintiff from the judgment in said cause.

HASCAL R. BRILL,
District Judge.

Dated St. Paul, Minn., April 5th, 1899.

224 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

LOUISA BANHOLZER, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

It is hereby stipulated by and between counsel for the respective parties hereto that the printed return in the case of Anna V. Conway, executrix, *vs.* Phœnix Mutual Life Ins. Co., the report of the decision whereof by the court of appeals of the State of New York is contained in 140 N. Y. Reports, on pages 79 to 86, and the printed briefs of counsel in said Conway case, printed copies of which return and briefs have been heretofore, by stipulation and agreement between the parties hereto, made a part of the record in this action, need not be kept on file in the office of the clerk of said district court, but, together with said stipulation, shall be attached to and made a part of the return herein of the said clerk to the supreme court upon plaintiff's appeal from the judgment, and that an order of court may be made authorizing said clerk to so attach to and make a part of his said return on said appeal the said copies of printed return and briefs and said stipulation.

C. D. & THOS. D. O'BRIEN,
Attorneys for Plaintiff.
FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

225 Endorsed: Filed April 5, 1899. Edward G. Rogers, clerk, by A. J. Stobbart, deputy.

226 STATE OF MINNESOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

I, Edward G. Rogers, clerk of the district court, Ramsey county, Minnesota, hereby certify and return to the honorable the supreme court of said State that I have compared the foregoing paper-writing with the original settled case, notice of motion for a new trial, order denying motion for a new trial, notice of appeal from order denying motion for a new trial, undertaking on appeal from said order, mandate of the supreme court, statement and affidavit of defendant's costs and disbursements and notice of taxation of the same, judgment, notice of appeal from judgment, undertaking on appeal from judgment, stipulation as to printed record, stipulation and order concerning printed record, the same being all the files and records in this office in the action therein entitled except only a certificate of satisfaction of the judgment of the supreme court upon the appeal from said order denying a new trial and transcript of said judgment of the supreme court, and depositions of Isaac E. Gillies, John J. Mahoney, and William M. Adams taken by the defendant at the city of New York, in the State of New York, now remaining of record in my office, and that the same is a true and correct copy and transcript of said originals and the whole thereof excepting said stipulation as to printed record, which is the original.

Witness my hand and seal of said court, at St. Paul, Minnesota, this 5th day of April, A. D. 1899.

EDWARD G. ROGERS, *Clerk*,
By ARTHUR J. STOBBART, *Deputy*.

[Seal of Supreme Court.]

[U. S. revenue stamp.]

227 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1899.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } No. 225.

Pursuant to an order of court duly made and entered in this cause on the tenth day of April, A. D. 1899, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the second judicial district, sitting within and for the county of Ramsey, be,

and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said Louisa Banholzer, appellant herein, the sum and amount of fifteen dollars ($15.00), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 10th day of April, 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$10.00
Clerk's fees for making return	
Printer's fees	
Clerk's fees, supreme court	5.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$15.00

228 [Endorsed:] 11366. State of Minnesota, supreme court. Louisa Banholzer, appellant, *vs.* N. York Life Ins. Co., respondent. Transcript of judgment. Filed April 10, A. D. 1899. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 394, W Book.

STATE OF MINNESOTA, *Supreme Court,* } *ss:*

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this tenth day of April, A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE, *Clerk.*

229 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1899.

LOUISA BANHOLZER, Appellant, *vs.* NEW YORK LIFE INSURANCE COMPANY, Respondent.	No. 225. Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1899, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered April 10th, A. D. 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

230 [Endorsed:] No. 11366. State of Minnesota, supreme court. Copy of order for judgment. Filed April 10, A. D. 1899. D. F. Reese, clerk. Entered on page 323, M.

231 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1899.

FRIDAY MORNING, 9.30 O'CLOCK,
April 7, *A. D.* 1899.

Court convened pursuant to adjournment, all the justices being present.

LOUISA BANHOLZER, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } Cal. No., 225; Reg. No., 11366.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision upon former briefs of counsel and taken under advisement.

A true record.

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

232 [Endorsed:] 11366. State of Minnesota, supreme court. Copy of minutes of argument. Filed April 10, A. D. 1899. D. F. Reese, clerk.

233 [Endorsed:] No. 11366. State of Minnesota, supreme court. Louisa Banholzer, appellant, against The New York Life Ins. Co., respondent. Judgment-roll. Filed April 10, 1899. D. F. Reese, clerk.

234 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, }
Office of Clerk of Supreme Court, } ss:

I, Darius F. Reese, clerk of the supreme court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record and all proceedings, with all things concerning the same, had in the said supreme court of the State of Minnesota in the case between Louisa Banholzer, appellant, and New York Life Insurance Company, respondent, including the opinions of the said supreme court therein, as appears from the original files and records, and the original stipulation between counsel for the respective parties and the thereto annexed printed record and briefs of counsel in the case of Anna V. Conway, executrix, *vs.* Phœnix Mutual Life Insurance Company.

And I do further certify and return that I have annexed to said transcript and included therewith and that the foregoing are copies of the petition for writ of error, with allowance of same, and of the assignments of error and of the bond, as the same remain on file and of record in said supreme court of the State of Minnesota, and are the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with proof of service thereof, and that the foregoing constitutes a true, full, and complete return to said writ of error.

Seal of the Supreme Court, State of Minnesota.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capitol, at St. Paul, Minnesota, this 20th day of April, A. D. 1899.

D. F. REESE,
Clerk of the Supreme Court, Minnesota.

235 [Endorsed:] No. —. State of Minnesota, supreme court. —— —— against —— ——. Judgment-roll. Filed ——, 189–. —— ——, clerk.

Endorsed on cover: File No., 17,386. Minnesota supreme court. Term No., 277. Louisa Banholzer, plaintiff in error, *vs.* The New York Life Insurance Company. Filed April 29th, 1899.

No. 277.

FILED
MAR 1 1900
JAMES H. McKENNEY,
Clerk

Brf. of O'Brien for P. E.

Supreme Court of the United States.

Filed March 1, 1900.

OCTOBER TERM, 1899.

No. 277.

LOUISA BANHOLZER,
Plaintiff in Error,

vs.

THE NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Counsel for Plaintiff in Error.

CHRISTOPHER DILLON O'BRIEN,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

(17,386)

OCTOBER TERM, 1899.

No. 277.

LOUISA BANHOLZER,
Plaintiff in Error,

vs.

THE NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Counsel for Plaintiff in Error.

I.

STATEMENT.

On September 16th, 1895, William Banholzer, the husband of plaintiff in error, took out a policy of

insurance upon his life in the New York Life Insurance Company, the defendant in error. The policy was of the kind known as a twenty year endowment, whereby the company agreed to pay $20,000 to the insured or assigns on the 16th day of September, 1915, if the insured should then be living, or in the event of his prior death, to pay that sum to his wife, Louisa Banholzer, the plaintiff in error, or in the event of her prior death, to the insured's executors, administrators or assigns, at the home office of the company in the City of New York, immediately upon receipt and approval of proofs of the death of the insured.

The contract was made in consideration of the written application for the policy, and further consideration of the sum of $1146 to be paid in advance, and of the payment of a like sum on the 16th day of September in every year thereafter during the continuance of the policy until twenty full years premium should have been paid. The first premium of $1146 was duly paid.

We take the liberty, for the sake of logical arrangement, of setting out at this point, instead of under Division III of this brief, that portion of the statute of the State of New York which we deem necessary to the decision of the case. That statute is likewise set out in the original complaint of the plaintiff and is found in the printed record in this court on page 3. The statute is New York Session Laws of 1892, chapter 690, section 92, and reads as follows:

"Section 92. No forfeiture of policy with-

"out notice. No life insurance corporation do-
"ing business in this State shall declare for-
"feited, or lapsed, any policy hereafter issued
"or renewed, and not issued upon the payment
"of monthly or weekly premiums, or unless the
"same is a term insurance contract for one year
"or less, nor shall any such policy be forfeited,
"or lapsed, by reason of non-payment when
"due of any premium, interest or installment
"or of any portion thereof required by the
"terms of the policy to be paid, unless a writ-
"ten or printed notice stating the amount of
"such premium, interest or installment or por-
"tion thereof due on such policy, the place
"where it should be paid, and the person to
"whom the same is payable, shall be duly ad-
"dressed and mailed to the person whose life is
"insured, or assignee of the policy, if notice of
"the assignment has been given to the corpora-
"tion, at his or her last known post-office ad-
"dress, postage paid by the corporation, or by
"an officer thereof or person appointed by it to
"collect such premium, at least fifteen and not
"more than forty-five days prior to the day
"when the same is payable.

"The notice shall also state that unless such
"premium, interest or installment, or portion
"thereof, then due, shall be paid to the corpor-
"ation, or to a duly appointed agent or person
"authorized to collect such premium by or be-
"fore the day it falls due, the policy and all pay-
"ments thereon shall become forfeited and
"void except as to the rights to a surrender-
"value or paid-up policy as in this chapter pro-
"vided.

"If the payment demanded by such notice
"shall be made within the time limited there-
"for, it shall be taken to be in full compliance
"with the requirements of the policy in respect
"to the time of such payment; and no such pol-
"icy shall in any case be forfeited or declared
"forfeited, or lapsed, until the expiration of
"thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent "of the corporation, or of any one authorized to "mail such notice, that the notice required by "this section, has been duly addressed and "mailed by the corporation issuing such policy "shall be presumptive evidence that such no- "tice has been duly given."

It was admitted on behalf of plaintiff in the court below that within the required time prior to September 16th, 1896, the due date of the second premium, the defendant company duly gave to the insured the notice required by this statute. (See printed record, folio 66).

On the 6th of October, 1896, the insured paid the defendant company $286.00 in cash and gave his note at six months for $860.00. This note read as follows:

"Pol. 692,465. St. Paul, Minn., 9-16-1896. "Without grace six months after date I prom- "ise to pay to the order of the New York Life "Insurance Company eight hundred and sixty "dollars at Second National Bank, St. Paul, "Minn., value received with interest at the rate "of 5 per cent per annum. This note is given "in part payment of the premium due 9-16-'96, "on the above policy with the understanding "that all claims to further insurance and all "benefits whatever which full payment in cash "of said premium would have secured shall be- "come immediately void and be forfeited to the "New York Life Insurance Company, if this "note is not paid at maturity, except as other- "wise provided in the policy itself.

"No. 43,205. Int. 21.50 $860.

"M'ch. 16, '97.

William Banholzer."

At the same time insured received the following renewal receipt:

"New York Life Insurance Company, 346-
"348 Broadway, New York. Cash $286.
"St. Paul, Minn., 10-6-'96.
"Note. 6 mo. dated 9-16-'96, due 3-16-'97,
"without grace. Made by William Banholzer.
"Payable at Second National Bank ,St. Paul,
"Minn. Received from the owner of policy
"No. 692,465, $286 in cash and his note at six
"months for $860 which continues said policy
"in force until the 16th day of Sept., 1897, at
"noon, in accordance with its terms and condi
"tions, provided the above note is paid at ma-
"turity, and this receipt signed by
"J. A. Campbell, Cashier."

The foregoing note and renewal receipt will be found in printed record on page 39.

On March 16, 1897, the due date of the above note, the insured paid the defendant company on account of his premium originally due Sept. 16, 1896, the further sum of $241.50 and gave the company his note at sixty days for the balance, $639, which was as follows:

"Pol. 692,465. St. Paul, Minn., 3-16-1897.
"Without grace two months after date I prom-
"ise to pay to the order of the New York Life
"Insurance Company, six hundred and thirty-
"nine dollars, at Second National Bank, St.
"Paul, Minn., value received, with interest at
"the rate of 5 per cent per annum.
"This note is given in part payment of the
"premium due 3-16-'96, on the above policy,
"with the understanding that all claims to
"further insurance, and all benefits whatever,
"which full payment in cash of said premium
"would have secured, shall become immediate-
"ly void and be forfeited to the New York Life
"Insurance Company if this note is not paid

"at maturity, except as otherwise provided in
"the policy itself.
"$639.00 (Signed)
"William Banholzer."
(See printed record, page 16.)

Upon receiving this note defendant surrendered to the insured his former note for $860.00. The second note was not paid at maturity, but shortly afterwards the full amount due was tendered the defendant who declined to accept it.

The insured died at the City of St. Paul, Minn., on the 5th day of July, 1897. On the 14th day of December, 1897, plaintiff duly served on the defendant at its home office in New York affidavits in proof of the death of the insured which were retained by defendant. (See printed record folio 39). As the company refused to pay, this action was commenced in January, 1898, in the District Court of Ramsey County, Minnesota.

It was admitted on the part of defendant, (see printed record, folio 66) that no notice, such as is required by the statute above set out, was given the insured by defendant within the required period prior to the maturity of either the insured's note dated September 16, 1896, or the one dated March 16th, 1897.

The plaintiff claimed in her complaint and has ever since contended that the statute in question required on the part of the defendant company the giving of the notice in the statute prescribed within the time therein indicated prior to the maturity of the insured's notes dated respectively 9-16-1896, and 3-16-1897, before a forfeiture of the policy could

be declared by reason of their non-payment; that the provisions of the statute are mandatory and cannot be waived; that the defendant having failed to give such notice could not declare the policy forfeited or lapsed by reason of the non-payment of these notes, or either of them, at their maturity. She claimed that a contrary interpretation of the statute would be denying to it that "full faith and credit" secured in every state to the public acts of every other state by virtue of section 1 of article IV of the constitution of the United States. (See printed record, folio 12.) While originally other questions were raised by the plaintiff they were determined adversely to her and her case made to stand or fall solely upon the interpretation of the New York statute, and the question now before this court is, did the court below in the case at bar *give to the statute such full faith and credit as is secured to it by the constitution of the United States.* This question may be said to permeate the entire case, sometimes expressly and sometimes by necessary implication. It is raised in the complaint, where the statute, is set forth in terms; it was the vital question in the mind of the District Court in the trial of the case (printed record, folios 67 to 70); in the Supreme Court on appeal from the order of the District Court refusing a new trial, it was the leading, and on reargument the sole issue; on appeal from the judgment of District Court this was the only question presented to the Supreme Court of Minnesota (printed record, folios 12 to 14).

II.

ERRORS ASSIGNED.

Plaintiff in error has assigned and relies upon the following errors which are manifest in the record and proceeding of the lower court in this case, namely:

1. Whereas, in her complaint she set out the public act of the State of New York, being session laws of 1892, chapter 690, section 92, which is set forth in the foregoing statement of plaintiff in error; and said public act was admitted by the defendant in error to be genuine; and whereas, the plaintiff in error in the lower court did specially set up and claim that, by virtue of the force and effect secured to the said public act in the State of Minnesota by section 1 of article IV of the constitution and section 905, Revised Statutes, of the United States, under the facts disclosed by the record, no forfeiture of the life insurance policy upon which a recovery was sought in this action had or could have occurred or could be declared, and did specially set up and claim under said sections of the constitution and statutes of the United States an exemption and immunity from any forfeiture of said policy; the court below erred in deciding against the exemption and immunity aforesaid specially set up and claimed by plaintiff in error, for the reason that it thereby did not give to said public act of the State of New York, the full faith and credit secured thereto by the said sections of the constitution and statutes of the United States.

2. For the same reason and in like manner the court erred in holding that the provisions of said public act did not apply to that portion of the premium due March 16th, 1897, upon said policy, for which portion thereof the insured in said policy gave his promissory note dated 9-16-'96.

3. For the same reason and in like manner the court erred in determining that the provisions of said public act did not apply to that portion of the premium due May 16, 1897, upon said policy for which portion thereof said insured gave his promissory note dated 3-16-'97.

4. For the same reason and in like manner the court erred in holding, that having prior to the time the annual premium became payable in September, 1896, given the notice required by the said public act, defendant was not required to give any other notice.

5. For the same reason and in like manner the court erred in deciding that upon the failure of said insured to pay his said note dated 3-16-'97, at its maturity his policy lapsed and became forfeited, defendant in error having admitted its failure to give the notice required by said public act within the requisite period prior thereto.

6. For the same reason and in like manner, on account of the errors above specified having also occurred in the proceedings in said action in the District Court of Ramsey County, Minnesota, whence it was carried by appeal from an order de-

nying plaintiff's motion for a new trial to the Supreme Court of that state, the latter erred in not reversing the said order and granting the plaintiff a new trial.

7. For the same reason and in like manner, on account of the errors above specified having also occurred in the proceedings and judgment in said action in said District Court from which judgment plaintiff in error appealed to said Supreme Court of the State of Minnesota, the latter erred in not reversing such judgment and in not directing a new trial of said action.

8. For the same reason and in like manner the court below erred in rendering judgment for the defendant in error, whereas by the law of the land, such judgment ought to have been given plaintiff and against defendant in error.

9. The court below erred in so far as it holds that the New York Court of Appeals in the case of Conway v. Insurance Company, 140 New York 79, intended to decide the question of the applicability of said provisions of said public act relative to notice to a portion of a premium for which the insured gave his promissory note, under such circumstances and conditions as existed in the case at bar.

III.

POINTS OF LAW AND FACT.

Assignments one to eight inclusive rest on construction of the provisions of section 92, of chapter 690 of the New York Session Laws of 1892, as *res integra*. Counsel for defendant in error have claimed that the matter is not *res integra* that it has been passed upon by the Court of Appeals of New York in the case of Conway v. Insurance Company, 140 N. Y. 79, which forecloses all other courts upon the question. This I dispute, as is seen in plaintiff's ninth assignment of error, which will be discussed first.

A. The ninth assignment of error is as follows:

> "That court below erred in so far as it holds "that the New York Court of Appeals in the "case of Conway v. Insurance Company, 140 N. "Y. 79, intended to decide the question of the "applicability of said provisions of said public "act relative to notice to a portion of a pre- "mium for which the insured gave his promis- "sory note, under such circumstances and con- "ditions as existed in the case at bar."

1. Even if the Court in the Conway case had intended to decide that question, the decision would not be an authority binding upon this or any court upon the same question in this case, because the statute referred to in the Conway case was chapter 321, Laws of 1877, which is different and not nearly so comprehensive as section 92, chapter 690, laws of 1892, to which plaintiff claims the lower court failed to give full faith and credit.

The law of 1877 read as follows:

"Section 1. No life insurance company do-
"ing business in the state of New York shall
"have power to declare forfeited or lapsed any
"policy hereafter issued or renewed by reason
"of non-payment of any annual premium or
"interest, or any portion thereof, except as
"hereinafter provided. Whenever any pre-
"mium or interest due upon any such policy
"shall remain unpaid when due, a written or
"printed notice stating the amount of such
"premium or interest due on such policy, the
"place where said premium or interest should
"be paid, and the person to whom the same
"is payable, shall be duly addressed and mail-
"ed to the person whose life is assured, or the
"assignee of the policy, if notice of the assign-
"ment has been given to the company, at his
"or her last known post-office address, postage
"paid by the company, or by an agent of such
"company, or person appointed by it to collect
"such premium. Such notice shall further
'state that unless the said premium or interest
"then due shall be paid to the company or to a
"duly appointed agent or other person author-
"ized to collect such premium within thirty
"days after the mailing of such notice, the said
"policy and all payments thereon will become
"forfeited and void. In case the payment de-
"manded by such notice shall be made within
"the thirty days limited therefor, the same
"shall be taken to be in full compliance with
"the requirements of the policy in respect to
"the payment of said premium or interest, any-
"thing therein contained to the contrary not-
"withstanding; but no such policy shall in any
"case be forfeited or declared forfeited or
"lapsed until the expiration of thirty days after
"the mailing of such notice. Provided, how-
"ever, that a notice stating when the premium
"will fall due and that if not paid the policy
"and all payments thereon will become forfeit-

"ed and void, served in the manner hereinbe-
"fore provided, at least thirty and not more
"than sixty days prior to the day when the
"premium is payable, shall have the same ef-
"fect as the service of the notice hereinbefore
"provided for."

The law of 1892 is set out in terms in our statement, part I of this brief. We do not admit that the Conway case was a decision of the question under the law of 1877, but we do admit that that law was susceptible of the construction which counsel for defendant in error say they find placed upon it in the Conway case. The law of 1892, on the other hand, we claim is not at all susceptible of such a construction. The two laws are easily distinguishable when the important parts are contrasted, and the greater comprehensiveness of the law of 1892 is in like manner apparent.

1892.	1877.
Nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest of instalment or of any portion thereof required by the terms of the policy to be paid, unless, &c.	No life insurance company shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of any annual premium of interest, or any portion thereof, except, &c.

The former law is susceptible of being limited in its application to premiums or portions of premiums due at annual or regular and equidistant periods, because in the former law the words "premium or interest or any portion thereof" are qualified and restricted by the word "annual." The latter law is

not susceptible of such limitation because in the latter law those words are not qualified or restricted by the word "annual" (which is entirely omitted); and because too in addition to this relief from restriction, the operation and force of those words ("premium or interest or any portion thereof") are enlarged and magnified by the introduction of the phrase "when due" and the word "installment," which are not found in the earlier law. Thus is the later law seen not only to be the more comprehensive, but also essentially different from the earlier one in particulars of vital importance to this plaintiff's interests.

The law of 1892 expressly repealed that of 1877.

Rosenplanter v. Society, 96 Fed. R. 721, 725.

2. But the Conway case was not a decision of the question now before the court, even under the law of 1877, i. e., the question of the applicability of the provision relative to notice to premiums, interest, or instalments or portions of premiums, represented by the promissory notes of insured persons.

That case does not control the decision of this court in the construction of the statute, unless the case would be a binding precedent upon the New York Court itself under the common law maxim *stare decisis*.

Carroll v. Carroll, 16 Howard 275, 286.

In that case this court say:

> "If the Court of Appeals had found it neces-
> "sary to construe a statute of that state in or-
> "der to decide upon the rights of parties sub-

"ject to its judicial control, such a decision, "deliberately made, might have been taken by "this court as a basis on which to rest our judg- "ment. But it must be remembered that we "are bound to decide a question of local law, "upon which the rights of parties depend, as "well as every other question, as we find it "ought to be decided. In making the exami- "nation preparatory to this finding, this Court "has followed two rules, one of which belongs "to the common law, and the other is a part "of our peculiar judicial system. The first is "the maxim of the common law *stare decisis*. "The second grows out of the thirty-fourth sec- "tion of the Judiciary Act (1 Stat. at L. 92,) "which makes the laws of the several states "the rules of decision in trials at the common "law; and inasmuch as the states have com- "mitted to their respective judiciaries the pow- "er to construe and fix the meaning of the stat- "utes passed by their legislature, this Court "has taken such constructions as part of the "law of the state, and has administered the "law as thus construed. But this rule has "grown up and been held with constant refer- "ence to the other rule, *stare decisis;* and it is "only so far and in such cases as this latter "rule can operate, that the other has any ef- "fect."

In order that a decision may constitute a precedent binding upon the Court under the doctrine stare decisis, it must possess the following characteristics:

a. It must have been made within and upon the issues actually before the court for judicial determination;

b. It must have been necessary to the determination of those issues;

c. It must have been needful to the ascertainment of the right or title in question between the parties;

d. It must have been a matter in judgment.

e. It must have been investigated with care, and made deliberately and upon solemn argument.

f. There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.

Carroll v. Carroll supra.

Grimes v. Byrne, 2 Minn. 89-102.

White v. Scott, 4 Barb. 56-59.

Judson v. Gray, 11 N. Y. 407-412.

People v. Mayor, 9 Barb. 544.

Harris v. Clark, 2 Barb. 94-101, 102.

Wells on Res Adj. & Stare Dec. p. 530 fol.

In Carroll v. Carroll, the Court say:

"If the Court of Appeals had found it nec-
"essary to construe a statute of that state in
"order to decide upon the rights of parties sub-
"ject to its judicial control, such a decision, de-
"liberately made, might have been taken by
"this court as a basis on which to rest our
"judgment."

"If the construction put by the court of a
"state upon one of its statutes was not a mat-
"ter in judgment, if it might have been decided
"either way without affecting any right
"brough into question, then, according to the
"principles of the common law, an opinion on
"such a question is not a decision. To make it
"so, there must have been an application of the
"judicial mind to the precise question neces-
"sary to be determined to fix the rights of the

"parties and decide to whom the property in "contestation belongs. And therefore this "Court and other courts organized under the "common law, has never held itself bound by "any part of an opinion, in any case, which was "not needful to the ascertainment of the right "or title in question between the parties. In "Cohen v. State of Virginia, 6 Wheat. 399, "this Court was much pressed with some por- "tion of its opinion in the case of Marbury v. "Madison. And Mr. Chief Justice Marshall "said: 'It is a maxim not to be disregarded "'that general expressions in every opinion "'are to be taken in connection with the case "'in which those expressions are used. If they "'go beyond the case, they may be respected, "'but ought not to control the judgment in a "'subsequent suit, when the very point is pre- "'sented. The reason of this maxim is ob- "'vious. The question actually before the "'court is investigated with care, and consid- "'ered in its full extent; other principles "'which may serve to illustrate it are consid- "'ered in their relation to the case decided, but "'their possible bearing on all other cases is "'seldom completely investigated.'"

Supreme Court of Minnesota in Grimes v. Bryne:

"A certain exercise of discretion must enter "into every examination of this nature, and no "adjudicated case can be authority for another "without the facts are identical in both. 'The "'positive authority of a decision is co-exten- "'sive only with the facts upon which it is "'made.' Marshall, C. J., 12 Wheat. 333."

The Court in People v. Mayor:

"We look into these opinions in vain for the "evidence of that solemn argument and ma- "ture deliberation, which upon the doctrine of "'*stare decisis*, should give to this case the "weight of authority sufficient to foreclose the

"judgment of all other tribunals upon the same "question."

In the case of Harris v. Clark, the Court say:

"In opposition to this doctrine, however, the "case of Wright v. Wright is pressed upon us "as an authoritive adjudication, which we are "bound to follow. We believe in a rigid adher- "ence to the doctrine of *stare decisis*. We re "gard it as necessary to preserve the certain- "ty, the stability, and the symmetry of any "system of jurisprudence; and therefore, if we "had any reason to believe that the decision in "this case was made upon deliberate consider- "ation, and that the adoption of the reasons as- "signed by the judge, was necessary to the de- "cision of the questions before the court, we "should certainly regard it as an authority "binding upon us, and leave the error, if any "there were, to be corrected in the court of "the last resort. But we do not think the case "of Wright v. Wright entitled to the author- "ity of a judgment upon the point in question. "* * * The decision might well have been "placed upon the ground assumed by the cir- "cuit judge, in refusing to grant the same or- "der, which in no respect involved the princi- "ple now under consideration. It is manifest "from the report of that case, that it did not "receive a deliberate examination either by "the counsel or the court. * * * For these "reasons we consider ourselves at liberty to "dispose of this interesting and important "question, unembarrassed by the authority of "the decision in Wright v. Wright."

Upon the question of the applicability of the provisions of the statute relating to notice to premiums, or instalments or portions of premiums, for which an insured has given his note, the Conway case possesses none of these essential characteris-

tics of a valid precedent under the doctrine *stare decisis*. The facts of the Conway case were these. Oct. 24th, 1891, the fifth annual premium came due upon a policy substantially like the Banholzer policy. Conway failed to pay it, but gave to the general agents of the Company his note in the following words and figures:

"$202.35 Troy, Oct. 24th, 1891.

"Six months after date, I promise to pay to "the order of M. V. B. Bull & Co., two hundred "35-100 dollars, at Manufacturers Nat. Bank, "with interest, value received.

"W. C. Conway."

(See printed record, page 61.)

M. V. B. Bull & Co., the general agents took this note, but withheld the renewal receipt, to which insured was entitled on paying his premium. The policy contained provisions

"That no agent or other person can alter, "modify or waive any of the terms or condi- "tions of this policy," and "that if any subse- "quent premium hereon be not paid when due, "and a separate receipt signed by the president "or secretary of this company in each case giv- "en therefor, then this policy shall cease."

Conway v. Insurance Co., 140 N. Y. 80.

A clause equally restrictive upon an agent's power to waive or postpone payment of premiums, or to accept them after due date, was contained in each renewal receipt. A few days before the maturity of this note Conway wrote to the agents asking its renewal for a period of time, to which they wrote him in reply:

"Your renewal has remained unpaid since

"October last, pending the maturity of your "note, and we do not feel at liberty to accept "a note extending the time any further. We "will, if you so request, recall your note from "the bank * * * and hold your renewal "at this office as long as it may be possible to "do so. You will understand that we are like-"ly any day to be required to return it to the "home office for cancellation."

Conway v. Insurance Co., 140 N. Y. 81.

The note was not paid at maturity and a few days afterward the assured died.

In the complaint there was an allegation (printed record part of folio 119) that defendant failed to give the statutory notice respecting the premium due by the terms of the note, but it was wholly immaterial to the issues and decision of the case whether defendant gave it or did not give it. The trial court, in disposing of the case, never mentioned the matter at all, (printed record, pp. 79 and 80), which indicates that it was not urged before nor considered material by that court. Counsel for appellant, the company, in their long and exhaustive brief in the appellate court make no reference whatever to the question of the applicability of the provisions of the statute relating to notice to the "premium due by the terms of the note," which indicates that they were unaware of the presence of such a question in the case. They discuss the statute with reference solely to an annual premium (printed record, pp. 98 and 99.) Finally counsel for respondent makes only a cursory reference to the question in his brief in the Appellate Court; he devotes eight of the four hundred

and twenty-five lines of his brief to it, and no more, (printed record, folio 206); which indicates that he couldn't have thought the question of any importance in the case. The truth is that the only material question in the case was whether the note of Conway to the general agents of the company was binding upon the company itself as a payment of the premium due Oct. 24th, 1891, from Conway; in other words whether the company had, by the action of its agents duly authorized in that regard, waived cash payment of that premium, and thereby lost the right to declare the policy lapsed for non-payment of the premium. The lower or trial court decided this question in the affirmative, the higher court in the negative, and upon that decision alone each respectively founded its judgment of the case. Whether we take the affirmative or the negative view of that question, the matter of the applicability of the statute to premiums, or an instalment or portion of a premium, for which a note has been given, is in no way at all involved. For if we take the affirmative, and hold that the company was bound by the action of its agents and that it did waive cash payment of the premium, then we find that the company could not have declared the policy forfeited and lapsed for non-payment of the note at maturity even if it gave the statutory notice within the prescribed time prior thereto of its intention to do so, *because there was no provisions either in the note or in the policy, which would permit them to do it.* On the other hand if we take the negative view of the question,

as the appellate court did, we find, just as they did, that Conway's policy ceased Oct. 24th, 1891, or when he failed to pay his premium then due within the period of grace allowed, and was never afterward revived or reinstated. Then of course there was no occasion for giving any more statutory notices. That the question we have indicated was the sole material question in the Conway case is gleaned from reading the report of it. The following excerpts from the opinion:

> "But in dealing with agents, whose powers "were limited, the insured was bound by the "limitations, * * * It was, therefore, "fairly inferable that the agents of the defend- "ant were at liberty, *not to make any new "agreement as to the time for the payment by "the insured of his premium*, but to accept "payment of it and thus waive the right to de- "clare a forfeiture; provided, that at the time "the conditions had not been changed by an "alteration in the health of the insured. While "the contract of insurance was in force, and up "to the time when the insured had the right "to renew it by payment of the premium in ad- "vance, the risk in the matter was on the com- "pany; but upon failure to pay, after notice, "upon the due date of the premium, the risk "was on the insured that, pending the delay "permitted by the agents, he might change in "health, if not die, and his insurance be lost."
>
> "When it became obligatory upon him, in or- "der to be entitled to a renewal of the insur- "ance agreement, to pay his premium, he knew "*that no agent had authority to make any "new or other agreement affecting the terms "of the existing policy.* If he failed to make "payment and elected to rely upon some cus- "tom which might operate to save the policy "from forfeiture, what was the situation? Only

"this, that as there had become engrafted upon "the authority of the agents, by force of the "company's sanction, a power to accept pay- "ment of past-due premiums in those cases "where the physical conditions of the assured "were unchanged, they might subsequently be "willing and able to deliver to him a renewal "receipt upon his payment of the past-due pre- "mium. Assuming his knowledge of the ex- "istence of such a custom in the office, it was "not a fact which so far changed the situation "as to have entitled him to rest upon it with "the same security as upon a new agreement "with respect to the time of payment, validly "made and enforceable against the company. "He simply *threw himself upon the chances of* "*life* and of the exercise by the agents of a con- ditional authority to act."

Upon the question whether the company waived cash payment of the premium October 24th, 1891, by reason of the conduct of its agents in taking a note for it payable to them, the opinion of the Court of Appeals in the Conway case possesses the characteristics of valid precedent under the doctrine stare decisis; but upon no other question does it possess them, since that was the only question in the case. The question of the applicability of the statute relating to notice to a premium, or instalment or portion of a premium, for which the insured had given his note was (a) not within the issues before the Court; (b) its determination was not necessary to the determination of the issues in the case; (c) its determination was not needful to the ascertainment of the rights or title in question between the parties; (d) was not a matter in judgment; (e) was not investigated with care, nor de-

cided with deliberation, nor after solemn argument; (f) there was no application of the judicial mind to it as the precise question necessary to be determined to fix the rights of the parties.

When therefore the Court proceeds to use the following language in the Conway case:

> "No further notice was required from the "company to the deceased. The notice pro- "vided to be given by the statute as a condi- "tion of its right to declare a policy lapsed for "non-payment of an annual premium was not "necessary, inasmuch as it had duly given the "notice before the premium became due, which "the statute has provided for. The statute "does not apply to this case. (Chap. 341, Laws "1876, and Chap. 321, Laws 1877.)"

We have to take that language with reference to the facts of that case. So taken it is apparent that the Court was correct, and it is equally apparent that the Court had not in mind and did not intend that language to apply to a state of facts such as is presented to this Court in the case at bar, where as will appear, by a valid contract made by Mr. Banholzer directly with the company itself, and binding upon the company, the time for payment of an instalment or portion of his premium due September 16th, 1896, was extended to May 16th, 1897.

B. If our understanding of the language of the New York statute is right, this court must agree with us that the lower court erred in those respects specified in Plaintiff's Assignments of error numbered one to eight.

THE PROVISIONS OF THE NEW YORK STATUTE RELATING TO NOTICE ARE CLEAR AND UNAMBIGUOUS AND ACCORDINGLY ARE TO BE TAKEN AND UNDERSTOOD IN THEIR ORDINARY, PLAIN AND POPULAR SENSE; THAT SO TAKEN AND UNDERSTOOD THEY OBLIGED THE DEFENDANT IN ERROR TO GIVE THE NOTICE THEREIN PRSCRIBED WITHIN THE TIME THEREIN DESIGNATED PRIOR TO THE MATURITY OF THE NOTE OF THE INSURED DATED 3-16-97 BEFORE A FORFEITURE OF THE POLICY COULD BE DECLARED FOR FAILURE TO PAY THE NOTE.

Mr. Banholzer's annual premium was due Sept. 16, 1896, and payable within thirty days of grace thereafter according to the terms of the policy. The policy continued in force during this period of grace, October 6th, 1896, (see statement supra) the company accepted from him $286 cash and his note for the balance of the premium due, and gave him a renewal receipt. The note bore interest at 5 per cent, was due March 16th, 1897, and contained a provision for forfeiture of the policy in case of its non-payment at maturity, March 16th, 1897, the Company accepted a further instalment of $241.50 cash on the premium, from Mr. Banholzer, and his note for the balance, $639, due May 16th, 1897. This note contained the same provision for forfeiture of the policy as the first note.

The only natural and reasonable, and likewise

the only practical and common sense view of these transactions is this: October 6th, 1896, while the contract of insurance was still in force, the parties to it saw fit to alter and modify its original terms, by an agreement founded on a valuable consideration and binding upon them, to the extent of extending the time of payment of an "instalment or portion" of the premium from Sept. 16th, 1896, to March 16th, 1897. By the modified contract there was due on March 16th, 1897, an instalment or portion of a premium. On that date the parties saw fit again to modify their contract by extending the time of payment of a smaller instalment or portion of the premium from that date to May 16th, 1897; so that on the latter date there came due "interest" and an "instalment" or "portion" of a premium "required by the terms of the policy to be paid."

For non-payment of such interest and instalment or portion of a premium, the company could not declare the policy forfeited and lapsed unless it gave the insured notice as required by the statute of its intention to do so. The clear and unambiguous terms of the statute taken and understood in their plain, ordinary and popular sense require this; and they are mandatory and not subject to be set aside either by the company or by the insured, or by both together.

Society v. Clements, 140 U. S. 226-233;
Society v. Nixon, 81 Fed. R. 796;
Society v. Trimble, 83 Fed.R. 85;
Mutual Life Co. v. Hill, 97 Fed. R. 263;
Rowe v. Ins. Co., 38 N. Y. Supl. 621-625.

The Court of Appeals of New York has determined that if, subsequently to the execution of a contract of insurance, it be modified by the parties to the extent of making the premium payable in quarter-annual instead of annual instalments, the statute of 1877 relative to notice would apply to the quarterly instalments.

DeFrece v. Ins. Co., 136 N. Y. 144-149, 150.

That is exactly in accord with our understanding of the provisions of the statute.

Our view given above, that the time of payment of a portion or instalment of the premium was extended from Sept. 16th, 1896, to May 16th, 1897, is the same as that of the Court of Appeals of New York expressed in a case almost identical with this in point of fact.

Holly v. Met. L. Ins. Co., 105 N. Y. 437-443, 444.

We quote from the opinion, underscoring those expressions which indicate the truth of the foregoing assertion:

> "The written receipt is to be read in connec-
> "tion with this note, and the whole transaction
> "then appears to be and it was simply this:
> "The company acknowledged the receipt of the
> "February premium and continued the policy
> "in force to August sixteenth, provided the
> "note, which was given in place of cash pay-
> "ment of the premium, was paid at maturity.
> " * * * By failing to pay this last note
> "when due, the forfeiture provided therein
> "immediately attached and the plaintiff there-
> "by lost the right which he otherwise would
> "have had to further insurance, according to
> "the tenor of his policy, but which he agreed

"to give up on condition of obtaining an ex-
"*tension of the time in which to pay his pre-*
"*mium*, and by failing to pay it at the end of
"that time. * * * *The note not only ex-*
"*tended the time of payment of the premiums*,
"but * * * Here the plaintiff failed to
"pay his premium on the sixteenth of Febru-
"ary, and was accorded the favor of a post-
"ponement until the maturity of the first note
"in June, and then again until the maturity of
"the second in August * * *."

Our view is so much the natural and reasonable one to take, that Counsel for Defendant in error has repeatedly, in discussing the matter, fallen, unconsciously perhaps, into the use of such phrases and expressions as, "to extend the time," extension upon terms," "secure a further extension of time," "extension of time for payment of a premium," "extended the time of payment of premiums," modification of the original contract of insurance," "carry the insurance for the extended time;" expressions which we extract from his brief in the lower Court.

The company took the same view at the time, according to its letter. See printed Record, folios 80, 81.

The lower Court frequently refers to the transactions as extensions of time for payment of premium. See its opinions, printed record, folios 101, 102, 103.

II.

EVEN IF THE PROVISIONS OF THE STATUTE COULD BE CONSIDERED AT ALL AMBIGUOUS IN THIS REGARD, STILL IT CANNOT BE DENIED THAT IT IS FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION WE PLACE UPON IT,SO THAT A REASONABLY INTELLIGENT MAN ON READING THE STATUTE MIGHT HONESTLY PLACE THAT CONSTRUCTION UPON IT, THEN THAT CONSTRUCTION SHOULD PREVAIL, BECAUSE THE STATUTE OUGHT TO BE CONSTRUED MOST FAVORABLY TOWARD THE INSURED.

Ins. Co. v. Coos County, 151 U. S. 462, 463.
De Frece v. Ins. Co., 136 N. Y. 144.
Baxter v. Ins. Co., 119 N. Y. 450.
McDougall v. Society, 135 N. Y. 551.
Phelan v. Ins. Co., 113 N. Y. 147.
Carter v. Ins. Co., 110 N. Y. 15.
Society v. Nixon, 31 Fed. R. 800.

In the last case cited, the Court says:

"It has been several times decided by the "Court of Appeals of New York that the pro- "visions of this statute respecting forfeiture "should be strictly interpreted in favor of the "assured, and that the defense of a forfeiture "through non-payment of premium is not avail- "able to an insurance company if there has "been any departure on its part from the pro- "visions of the statute in regard to notice."

And as to contracts of insurance generally, this Court stated in 1894 in the Coos County case:

> "well settled that contracts of insurance, "like other contracts, are to be construed ac- "cording to the sense and meaning of the terms "which the parties have used, and if they are "clear and unambiguous, their terms are to "be taken and understood in their plain, or- "dinary, and popular sense." "when an insur- "ance contract is so drawn as to be ambiguous, "or to require interpretation, or to be fairly "susceptible of two different constructions, so "that reasonably intelligent men on reading "the contract would honestly differ as to the "meaning thereof, that construction will be "adopted which is most favorable to the in- "sured."

The New York statute should not be construed more loosely than a contract of insurance for it was a part of the contract. Besides it is a canon of interpretation, that the legislative purpose and the object aimed at are to be borne in mind, and that language susceptible of more than one construction is to receive that which will bring it in harmony with such object and purpose rather than that which will tend to defeat it.

> 23 Am. & Eng. Enc. of L., 319 (1893 Ed.) & cas. cited.

Our construction harmonizes with the purpose of the law.

III.

THERE ARE NO SERIOUS OBSTACLES IN THE WAY OF ENFORCEMENT OF THE PROVISIONS OF THE STATUTE AS WE UNDERSTAND THEM.

1. It is claimed by counsel for defendant in error, that the statute applies only to premiums and portions of premiums, and was not intended to apply to promissory notes. True, the statute does not apply to promissory notes, but does to premiums, and instalments and portions of premiums which the promissory notes happen to represent. If it did not, insurance companies could evade its provisions entirely by taking promissory notes from their policy holders to evidence all premiums.

2. There can be no trouble about the place where and person to whom to pay the premium for which a note has been given, nor would the note and the premium which it evidences be payable at different times and places and to different persons, for the terms of the note are a modification of the provisions of the policy in those respects.

3. Our opposing counsel has stated that the effect of the statute is to make the premium payable not less than thirty days after notice; hence, if applicable to notes given for premiums, the maturty of such notes (perhaps negotiable and payable at different times) might be dependent on the

subsequent acts of the parties. Counsel is mistaken, for the provisions of the statute in no way affect the time of payment, but only the right to declare a forfeiture for failure to pay at the time agreed upon.

4. The insured holds possession of his policy, but not of his note given for a premium; so that he is in a better position to be informed as to the amount, time, place, etc., in case of a premium for which he has not given a note.

5. It has been sought to raise an essential distinction between a premium and the indebtedness upon a note given for a premium. Premium in insurance means, the consideration paid or to be paid an insurer for the risk he undertakes by the contract of insurance. See Bouvier (Rawle's Revision); May on Insurance. The indebtedness upon a note given for a premium, or an instalment or portion of a premium answer the definition precisely. The statute does not apply to the note as such, but to the premium which the note evidences.

6. Defendant in error has contended by its counsel, that, since it gave the notice prescribed by the statute prior to the due date of the whole premium, it ought not to be required to again give the notice as to portions of the same premium. When it extended the time for payment of an instalment or portion of the premium it waived the effect of the notice. Justice Canty, of the Supreme Court of

Minnesota, in his dissenting opinion in this case, stated:

> "Surely, extending the time of payment of "the instalment of premium after giving the "statutory notice will waive the notice, and "The effect will be the same as if the notice had "never been given. Then the fact that notice "was given in this case before the time of pay- "ment was extended is wholly immaterial." (See Printed Record, folio 103.)

7. Opposing counsel in his brief in the lower court stated:

> "The statute requires the notice to be mailed "at least fifteen days prior to the day the pre- "mium is payable. Suppose a note were given "for a portion of a premium and were made "payable ten days from its date. How could "a statutory notice of its maturity be legally "given?"

To this we might retort, suppose the company give me a policy, in which the first premium, for instance, is payable in ten days; how could a statutory notice of its maturity be given legally? It is within the power of insurance companies to avoid such difficulties.

Justice Canty (printed record, fol. 104) stated in this regard:

> "Suppose a law to prevent the forfeiture of "mortgaged chattels on the due day provided "that a chattel mortgage should be foreclosed "by giving fifteen days' notice, to expire on "the day the mortgage debt fell due. Could "it be held that the law did not apply merely "because there was only ten days from the "time of the execution of the mortgage to the "day the debt fell due? Again, could such a

"law be evaded by extending the time of pay-
"ment?"

8. It has been contended, that the note of Sept. 16, 1896, was accepted as a conditional payment of the premium, which was treated as though paid pending the maturity of the note; and that when the insured failed to pay the note the policy lapsed by reason of the operation of the condition in the note and the provisions of the policy itself, and lapsed as of Sept. 16th, 1896; therefore no notice prior to the due day of the portion of the premium evidenced by the note.

It is beyond dispute that the time for payment of a portion of the premium was extended, and that the policy continued in full force, to May 16th, 1897. Hence, simultaneously to hold that the policy lapsed Sept. 16th, 1896, is to hold it both in force and not in force between those dates, which is absurd. Courts sometimes declare certain pretended rights and relations void ab initio, but only in those cases where, for some reason, the pretended rights or relations never existed as a matter of fact. Here the contract was certainly in force up to, if not ever since, May 16th, 1897; hence this is not a case where a forfeiture ab initio could occur.

No scheme to evade the statute will be permitted to succeed.

Society v. McDougall, 19 N. Y. Supl. 481.

In that case the Court stated:

"that no scheme, however ingenious, can be
"devised by any insurance agent, which courts

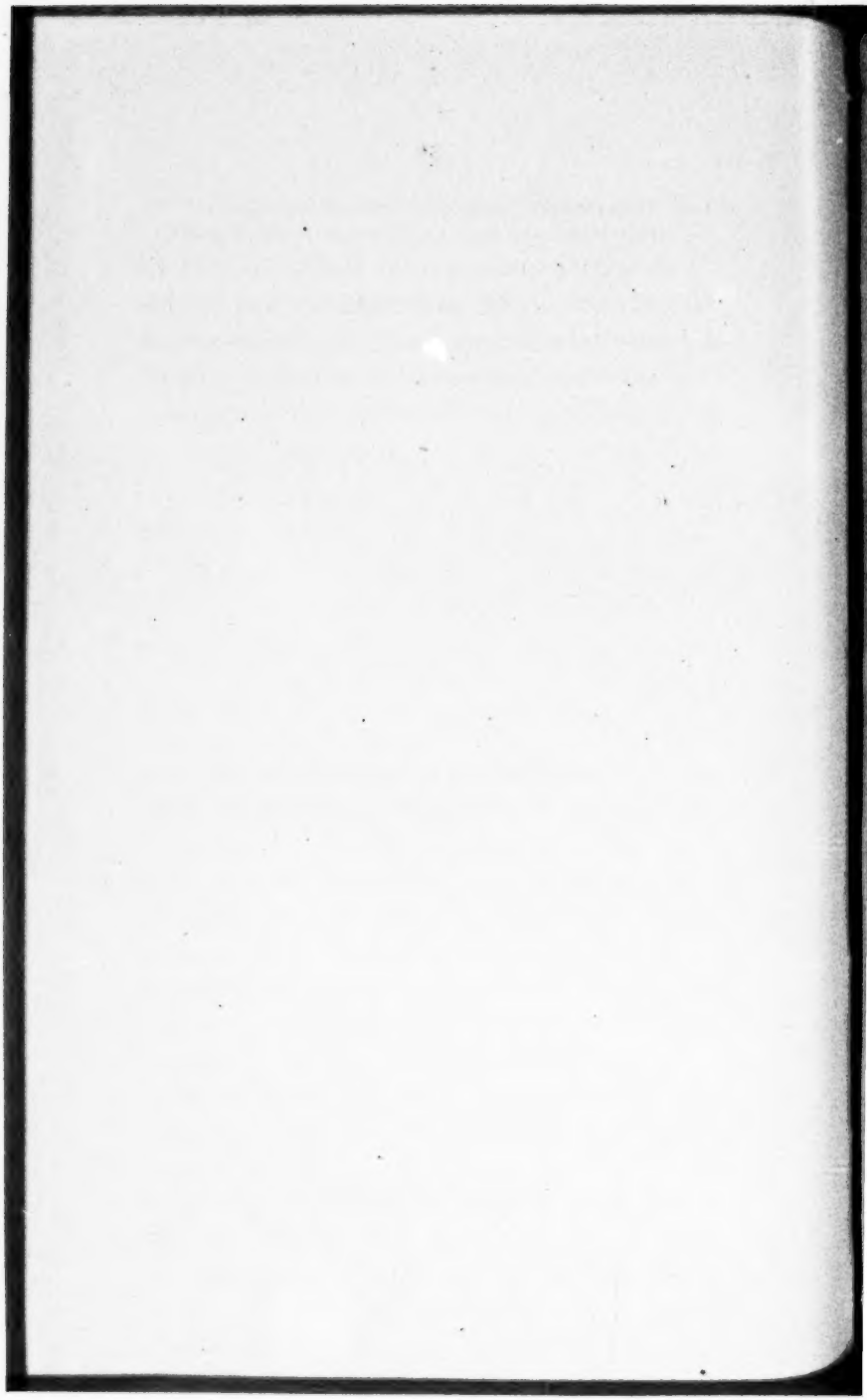
"can permit to be successful in evading the "provisions of this most reasonable statute."

Unless the provisions of the statute are held applicable to premiums, and instalments and portions of premiums, evidenced by the notes of the insured, those provisions can be evaded, and will be evaded, in the great majority of life insurance contracts.

C. Our conclusion is that the lower Court did not give to the New York statute "full faith and credit," and erred in not sustaining plaintiff's claim of immunity from forfeiture of the policy of her late husband, which, by virtue of the Constitution of the United States, she was entitled to under a public act of the State of New York.

Respectfully submitted,

CHRISTOPHER DILLON O'BRIEN,
Attorney for Plaintiff in Error.



No. 277.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 277.

Filed April 28, 1900.

LOUISA BANHOLZER,

Plaintiff in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF OF COUNSEL IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM.

CHRISTOPHER DILLON O'BRIEN,
Plaintiff's Attorney.

SUPREME COURT OF THE UNITED STATES.

(17,386)

OCTOBER TERM, 1899.

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LOUISA BANHOLZER,

Plaintiff in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF OF COUNSEL IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM.

Defendant in error has moved to dismiss the writ of error in this case or to affirm the judgment of the supreme court of the State of Minnesota. The motion to dismiss is based upon the alleged ground that this court has no jurisdiction to review the

judgment of the supreme court of the State of Minnesota. The motion to affirm is based upon the alleged ground, that if the record shows that this court has jurisdiction it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

The statement of facts made in defendant's brief upon this motion embraces several matters not at all pertinent to the question raised on the motion and omits certain facts which we deem to be pertinent, namely: that after the appeal from the order of the district court of Ramsey County denying plaintiff's motion for a new trial had been determined by the supreme court of Minnesota and the case remanded to the district court, and judgment entered in the latter court, an appeal to the supreme court from the judgment of the district court was taken conformably to the statutes and rules of practice of the courts of the State of Minnesota; that upon this appeal plaintiff assigned as error that the lower court in its proceedings and judgment denied to the public act of the state of New York set up in the plaintiff's complaint and admitted by defendant's answer, that faith and credit it was entitled to by virtue of the Constitution of the United States; and that the judgment of the supreme court rendered upon this appeal is the final determination of the case in the highest court of the State of Minnesota, which is here for review upon the writ of error issued out of this court.

As to that part of the brief of counsel for de-

fendant in error on this motion which may be designed to support the motion to affirm, we do not desire to make any special reply. We may be allowed, however, to remark that if the question we present to this court upon this appeal is so frivolous as not to need argument, then have we indeed gone astray in our understanding of the facts of this case, the constitution and statutes of the United States relevant thereto, and the decisions of this court, a considerable number of which we have examined, cited and quoted from in our brief upon the merits, and others of which we will cite in this brief. We require nothing more to relieve us of this unjustifiable charge of frivolity than a fair consideration of our case as the same appears in the record and shall be presented to this court.

The argument of counsel for the defendant in error in their brief upon this motion is altogether upon the merits of the case and hence entirely irrelevant to the question presented on this motion, with the exception of the last paragraph but one where are cited the cases of Glenn v. Garth, and Lloyd v. Matthews. We are satisfied, and believe the court will be so, that to suppose this case barred out of this court by the rule of those cases is completely to misconceive the situation which is here presented.

I.

THE LOWER COURT WAS NOT CALLED UPON TO CONSTRUE NOR WARRANTED IN CONSTRUING THE PUBLIC ACT OF THE STATE OF NEW YORK, BUT WAS CALLED UPON AND BOUND UNDER THE CONSTITUTION AND STATUTES OF THE UNITED STATES TO APPLY THAT ACT TO AND GIVE IT VALIDITY, CREDIT AND EFFECT IN THE DETERMINATION OF THE CASE AT BAR.

Johnson v. H. R. R. Co., 49 N. Y. 456.
Sturges v. Crowningshield, 4 Wheat. (U. S.) 202.
McCluskey v. Cromwell, 11 N. Y. 593.
Ruggles v. Illinois, 108 U. S. 526-534.
Wilkinson v. Leeland, 2 Pet. 627-662.
Doe v. Considine, 6 Wall. 458-479-480.
Amy v. Watertown, 130 U. S. 320-323-324.
McPherson v. Blacker, 146 U. S. 1-27.

As has already been set forth in our brief upon the merits the transactions between Mr. Banholzer and the defendant in error, which took place between September, 1896, and the time of his death, were such that under and by virtue of a valid and mutually enforceable contract made between them while the policy of Mr. Banholzer was in force, there was due, first on the 16th of March, 1897, and then again on the 16th of May of the same year, an installment or portion of a premium required by the terms of his policy to be paid. These installments or portions of premiums were a part of the

premium provided by the terms of the original contract of insurance to be paid on the 16th day of September, 1896, or within the month of grace thereafter allowed by the policy. But Mr. Banholzer desiring further time as to a part of that sum, which was $1146, before the expiration of that month of grace, paid the company $286 in cash and was granted an extension of six months' time to pay the balance of his premium. At the end of six months he paid $241.50 in cash and was granted a further extension of sixty days' time to pay the balance. In consideration of this extension the company exacted from Mr. Banholzer his promissory note for the amount of the deferred payment, and injected into this note a provision for the forfeiture of the policy in case of failure in payment of the note. It has long gone beyond the region of dispute that these transactions taken as a whole amounted to nothing else than a modification of the original contract of insurance in this respect, that, instead of being required to pay a premium of $1146 on the 16th of September, he was to and did pay $286 in cash at that time, and $241.59 on the 16th of March following, and on the 16th of May, 1897, was to pay the remaining portion of his premium. In consideration of this modification of the policy as originally made, Mr. Banholzer paid 5 per cent interest on the unpaid portion of the premium during the extended period, and agreed further that the provisions in the policy relating to forfeiture for non-payment of premium should apply to that portion of the premium, the time for

payment of which had been extended. Accordingly there was due on the 16th day of May, 1897, a portion or installment of a premium required by the terms of Mr. Banholzer's policy to be paid. That this was the true situation and only tenable view to hold with reference to those transactions and the relations between Mr. Banholzer and the defendant we believe to be beyond dispute. No other view of the matter has even been held by any of the judges of the lower courts who have examined this case, nor even by counsel for the defendant until a late stage in the proceedings, when they discovered the consequences to which it inevitably leads. The same view was taken by the court of appeals of the state of New York, in the case of Holly v. Met. L. Ins. Co., 105 N. Y. 437-443-444, a portion of the opinion of which we quoted in our brief upon the merits, on page 27 and 28. A premium in insurance is defined to be the consideration paid by the insured to the insurer for carrying the risk of the insurance. The sum which Mr. Banholzer promised by his note to pay defendant on the 16th of May, 1897, answers this definition precisely. An installment or portion of a premium being due on the 16th day of May, 1897, from Mr. Banholzer to the defendant, the law of 1892 of the state of New York, chapter 690, section 92, stepped in and declared that for non-payment of that installment or portion of premium, the defendant company should not under any circumstances or conditions whatsoever have the right to declare the policy of Mr. Banholzer forfeited and lapsed, unless a notice had

been given to Mr. Banholzer not less than fifteen or more than forty-five days prior thereto, stating the amount of such installment or portion of premium becoming due on the 16th of May, the place where it was to be paid, and to whom it was payable, and stating that unless it were paid by or before the day it fell due, the policy and all payments thereon would become forfeited and void. Defendants admitted their failure to do this (Record, fols. 66, 67). As far as this provision of the statute of New York is concerned there is absolutely no ambiguity, uncertainty, indefiniteness or vagueness in the language employed by the legislature. It is unambiguous, clear, and precise, to a degree that could not have been exceeded by using any other language, to the effect that when a portion or installment of a premium required by the terms of a policy of insurance to be paid was coming due, the insurer could, under no circumstances or conditions, declare such policy forfeited or lapsed by reason of non-payment when due of such installment or portion of premium unless the company gave the insured the notice prescribed by the law in the manner therein directed. This being the case, the law applicable to the relations existing between Mr. Banholzer and the defendant in this respect, being positively unambiguous, plain, precise, clear and free from all reasonable doubt, and defendant having admitted failure to comply with the law, there was no occasion for the lower court to construe that law, nor was it permissible under any sound rule of law for it to attempt to distort

and twist and tamper with the statute by use of any technical rules of construction. What is plain, clear, precise, unambiguous and free from doubt in a public statute, does not require nor permit of construction on the part of any courts, and any attempt at construction under such circumstances is an invasion by the court of the unalienable prerogatives of the legislature. This proposition we believe to be fully borne out by the authorities and we deem it not out of place, although no rule is so well known and so firmly established, to quote from a few of them, which in the short time allowed us to examine into this matter we have had time to look into, and have cited above.

In the case of Johnson v. H. R. R. Co., the court says:

"It is not for the court, acting upon conjecture "and surmising what may have been the intent of "the legislature, to interpolate exceptions in the "statute, thus in effect avoiding and nullifying the "express declaration of the legislature. * * * "So read, the statute is unambiguous and in no "need of interpretation. The language of the act "being explicit, and the words free from ambiguity "and doubt, capable of being read and understood, "expressing plainly and distinctly the sense of the "framers of the act, there is no occasion to resort "to other means of interpretation. Where the lan-"guage is definite and has a precise meaning, it "must be presumed to declare the intent of the "legislature, and it is not allowable to go else-"where in search of conjecture to restrict or extend "the meaning. * * * The provision here is "clear and precise, and courts cannot go beyond or "outside of it under pretext of interpretation to "cure any supposed blunder of the legislature."

In McCluskey v. Cromwell, the court in its opinion quotes with approval the following statements by Judge Johnson in Newell v. People, 7 N. Y. 97:

"Whether we are considering an agreement be-
"tween parties, a statute, or a constitution, with
"a view to its interpretation the thing we are to
"seek is, the thought which it expresses. To as-
"certain this, the first resort, in all cases, is to the
"natural signification of the words employed, in
"the order and grammatical arrangement in which
"the framers of the instrument have placed them.
"If thus regarded, the words embody a definite
"meaning, which involves no absurdity and no con-
"tradiction between different parts of the same
"writing,then,that meaning, apparent upon the face
"of the instrument, is the one which alone we are
"at liberty to say was intended to be conveyed. In
"such a case, there is no room for construction.
"That which the words declare, is the meaning of
"the instrument; and neither courts nor legisla-
"tures have the right to add to, or take away from,
"that meaning."

In Ruggles v. Illinois, the court decides that the words of the statute under consideration there were plain and interpreted themselves and quote Vattel's first general maxim of interpretation as follows:

"It is not allowable to interpret what has no
"need of interpretation. * * * When a deed
"is worded in clear and precise terms—when its
"meaning is evident and leads to no absurd con-
"clusion—there can be no reason for refusing to
"admit the meaning which such deed naturally
"presents. To go elsewhere in search of conjec-
"tures, in order to restrict or extend it, is but to
"elude it."

In the case of Doe v. Considine, this court having

quoted a clause of a statute under consideration, said:

"The language of this clause is plain and un-
"ambiguous. There is nothing in the context,
"rightly considered, which qualifies or effects it.
"There is, we think, no room for construction. * *
"Were we to adopt the construction claimed by
"the plaintiff's counsel, instead of adjudicating we
"should legislate. That we have no power to do.
"Our function is to execute the law, not to make
"it."

In McPherson v. Black, this court had under consideration the constitution of the State of Michigan, and upon this point said:

"The framers of the Constitution employed
"words in their natural sense; and where they are
"plain and clear, resort to collateral aids of inter-
"pretation is unnecessary and cannot be indulged
"in to narrow or enlarge the text."

It must be concluded, therefore, that to suppose that this case called for the construction of the statute of New York by the courts of the State of Minnesota is completely to misconceive the situation. It was a case for the application of the New York law and the courts of the State of Minnesota refused to apply it, thereby denying to the law any force, effect, credit or validity whatever in the case at bar. This court, therefore, has jurisdiction of the cause and in assuming such jurisdiction, it in no manner comes in conflict with the doctrine announced in the case of Glenn v. Garth, concerning which we have more to say infra.

It would be extremely unfair to tax us at this time with having made use in our brief on the

merits of the word construction with reference to this public act of the state of New York, for when we there used the word we did not have in mind the question now being considered.

II.

THE PUBLIC ACT OF THE STATE OF NEW YORK AND THE CREDIT AND EFFECT THAT THE SAME HAD BY LAW AND USAGE IN THE COURTS OF THAT STATE WAS PROVED AS A MATTER OF FACT IN THE LOWER COURT.

Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S. 622-623.
Glenn v. Garth, 147 U. S. 360-369.
Lloyd v. Matthews, 155 U. S. 222-227-228.

The law with reference to this matter is set out in these cases with great clearness and in substance is this:

That when in an action in the state court a party rests upon some right or title derived from or under a statute of another state, such statute and the effect that the same has by law or usage in the state where enacted, must be proved as a matter of fact whenever such proof is necessary to enable the court to ascertain what that effect is, in order to raise a federal question and bring the case within the jurisdiction of this court. That this is a fair expression of the rule is, we think, apparent from the following excerpts from the opinions of the court in those cases.

Chicago & Alton Ry. Co. v. Wiggins Ferry Co.:

"Whenever it becomes necessary under this re-
"quirement of the constitution for a court of one
"state, in order to give faith and credit to a public
"act of another state, to ascertain what effect it
"has in that state, the law of that state must be
"proved as a fact. No court of a state is charged
"with knowledge of the laws of another state; but
"such laws are in that court matters of fact, which,
"like other facts, must be proved before they can
"be acted upon. This court, and the other courts
"of the United States, when exercising their ori-
"ginal jurisdiction, take notice, without proof, of
"the laws of the several states of the United
"States; but in this court, when acting under its
"appelate jurisdiction, whatever was matter of fact
"in the court whose judgment or decree is under
"review, is matter of fact here."

Lloyd v. Matthews:

"Whenever a court of one state is required to as-
"certain what effect a public act of another state
"has in that state, the law of such other state must
"be proved as a fact."

Glen v. Garth:

"This record may be searched in vain for any
"proof that, as matter of fact, the public acts of
"Virginia had, by law or usage in Virginia, any
"other effect than was given them in New York."

It will be observed that under this rule it is necessary to make special proof of the effect which the public act of the sister state has by law or usage in that state, when, and only when, such proof is necessary to ascertain what that effect is. This is in accordance with sound reasoning and was stated by this court expressly in the opinion in Chicago & Alton Ry Co. v. Wiggins Ferry Co.,

which we have quoted above. The obverse of the proposition is, that when it is not necessary to prove the effect that a statute of a sister states has by law and usage in that state in order to enable the court to ascertain what that effect is, such proof is not required. The case at bar comes directly under this rule and is evidently such a case as the rule was intended to apply to. As we have shown, and as appears indeed from the mere perusal of the statute itself, the provisions and meaning of the statute are unambiguous, clear, certain and precise to a degree that could not have been exceeded by the use of any other language than that employed by the legislature. It was not necessary therefore to present to the lower courts any other evidence than the law of New York itself to show what effect the law had in New York by law or usage in order to enable the lower court to ascertain what effect that was. The effect of the statute was apparent on its face and there was no necessity of going further. A statute is presumed to be valid and to mean what it says and to have the effect which it discloses in plain, unambiguous, precise and certain terms. This proposition would hardly seem to require the citation of authorities in its support, but we submit the following quotation from the opinion of this court delivered by Mr. Justice Harlan in the case of Powell v. Pennsylvania, 127 U. S. 678-684:

"'Every possible presumption,' Chief Justice "Waite said, speaking for the court in the Sinking "Fund Cases, 99 U. S. 700, 718, 'is in favor of the

"'validity of a statute, and this continues until the "'contrary is shown beyond a rational doubt. One "'branch of the government cannot encroach on "'the domain of another without danger. The "'safety of our institutions depends in no small de-"'gree on a strict observance of this salutary rule'."

In Johnson v. H R. R. Co., the court says:

"Where the language is definite and has a pre-"cise meaning, it must be presumed to declare the "intent of the legislature."

In Kock v. Bridges, 45 Miss. 259, the court said:

"No principle is more firmly established, or "rests on more secure foundations, than the rule "which declares when a law is plain and unambi-"guous, whether it be expressed in general or lim-"ited terms, that the legislature shall be intended "to mean what they have plainly expressed, and, "consequently, no room is left for construction."

We may say, therefore, that the statute of New York must have been by the lower courts presumed to be valid and to mean what it says in unambiguous, certain, clear and precise words and that this presumption continued until the contrary were shown "beyond a rational doubt." This presumption was a matter of evidence in the court below, and if the defendants desire to maintain the monstruous contention that the courts of the state of New York had encroached upon the domain of the legislature of that state and determined that the law in question did not mean and could not have the effect which its words conveyed, that was a matter of defense and it rested upon the defendant to prove it "beyond a rational doubt" in order to overcome the legal presumption to the contrary.

The defendants were equal to this as they are to any other emergency that will enable them to defeat the just claim of this plaintiff. They did attempt to do this by bringing to the notice of the court below the case of Conway v. Insurance Co., 149 N. Y. 79. That case fails entirely to support their position, as is shown by our discussion of the case in our brief upon the merits and as was admitted by the lower court in its opinion on rehearing. We will not repeat that discussion here, for, in any event, it is matter for consideration upon the merits of this case and is irrelevant to the question presented upon this motion. It should be remembered that the public act of the state of New York in question was admitted by defendants in error to be genuine and authentic as set out in the complaint of the plaintiff. Record, folio 39.

The act was therefore before the court as a matter of admitted fact and no other evidence or proof thereof could be required or expected. We are the more convinced that our position with reference to this matter is correct for the reason that any other view leads to absurd and ridiculous consequences.

Suppose our position to be incorrect. Every case of the kind must arise under one or other of two conditions. Either the statute of the other state will have been under consideration by the courts of that state in some case or cases, or else it will not have been under consideration by the courts of that state in any case. Take the first alternative and we may say (since the case is one where the provisions of the statute are unambigu-

ous, clear and precise), a court must either have applied the statute or have found it to be invalid and hence refused to apply it. Now it certainly would not be required on the part of the litigant claiming a right under that statute in another state to introduce in evidence cases determined in the state where the statute was enacted which simply applied to the statute, for such proof would be wholly superfluous for the purpose of showing the effect of the statute to be what its provisions declare in unambiguous, clear and precise terms. The court will presume this from the statute itself. On the other hand it would not be required of the litigant to introduce in evidence decisions of the courts of the state where the statute was enacted, which had declared the statute invalid for that would be a matter of defense. Take the second alternative where we suppose that the statute has never in any case been before any court of the state where enacted for its consideration. How would it be possible to introduce any competent and proper evidence of the effect of the statute outside of the statute itself. Such evidence could take but two forms; one would be the evidence of a man learned in the law of the state where the statute was enacted, and what court would listen to the testimony of such a witness to the effect that the statute means what it says. Any court under such circumstances would certainly feel that it was being trifled with. In any event such testimony would be utterly superfluous, since there is a legal presumption in every case that a statute is valid and

means what it says. The other form would be to introduce in evidence all the decisions of all the courts of the state where the statute was enacted which had been decided since its enactment, all of which decisions the court would have to examine on a foolish quest, viz: to learn if the courts of the sister state had ever announced that the statute meant what its words declared. We are right, therefore, in concluding that the statute of the state of New York under which plaintiff claimed in the case at bar was proved in the lower courts as a matter of fact to the fullest extent that was possible, reasonable or necessary.

III.

WITHOUT REFERENCE TO WHETHER PLAINTIFF WAS RIGHT OR WRONG IN HER CONTENTION THAT BY REASON OF DEFENDANT'S ADMITTED FAILURE TO COMPLY WITH THE PROVISIONS OF THE PUBLIC ACT OF THE STATE OF NEW YORK, THE POLICY OF INSURANCE SUED ON COULD NOT HAVE BEEN FORFEITED OR LAPSED, THE MERE FACT THAT SHE CLAIMED UNDER THE PUBLIC ACT OF THE STATE OF NEW YORK AND THAT HER CLAIM WAS OVERRULED IN THE LOWER COURT GIVES THIS COURT JURISDICTION.

Green v. Van Buskirk, 5 Wall. 307 and 7 Wall. 139.

Crapo v. Kelly, 16 Wall. 610.

Thorman v. Frame, decided February 26th, 1900.

Hanley v. Donoghue, 116 U. S. 1.

Hancock National Bank v. Farnum; decided March 12th, 1900.

In the case of Green v. Van Buskirk, the facts are reported as follows:

"With this provision of the Constitution and "this law in force, Bates being the owner of certain "iron safes at Chicago, in the State of Illinois, on "the 3rd day of November, 1857, executed and del-"ivered, in the State of New York, to Van Buskirk "and others, a chattel mortgage of them. On the "5th day of the same month Green caused to be "levied on the same safes a writ of attachment, "sued by him out of the proper court in Illinois, "against the property of Bates. The attachment "suit proceeded to judgment, and the safes were "sold in satisfaction of Green's debt. Van Bus-"kirk, Green and Bates were all citizens of New "ork. Green's attachment was levied on the safes "as the property of Bates, before the possession was "delivered to Van Buskirk, and before the mort-"gage from Bates to him was recorded, and before "notice of its evistence.

"Van Buskirk afterwards sued Green, in the "New York courts, for the value of the safes thus "sold under his attachment, and Green pleaded "the proceding in the court of Illinois in bar of the "action. In this suit thus brought by him in the "New York courts, Van Buskirk obtained judg-"ment, and the judgment was affirmed in the high-"est court of the State of New York. From this "affirmance Green took a writ of error to this "court, assuming the case to fall within the twen-"ty-fifth section of the Judiciary Act, which gives "such writ in any case wherein is drawn in ques-"tion a clause of the Constitution of the United "States, and the decision is against the title, right, "or privilege specially set up. His assumption "was that the faith and credit, which the judicial "proceedings in the courts of the State of Illinois "had by law and usage in that state, were denied "to them by the decision of the courts of New York, "and that in such denial, those courts decided "against a right claimed by him under the above-"mentioned Section 1, Article IV. of the Constitu-

"tion, and the act of congress of May 26th, 1790, on "the subject of it."

Mr. Justice Miller in delivering the opinion of the court said:

"And notwithstanding the inverted manner in "which the court has stated its legal conclusions, "it seems clear that it did pass upon the effect of "the judicial procedings in Illinois upon the title "of the property in contest. * * *

"We do not here decide that the procedings in "the State of Illinois have there the effect which "plaintiff claims for them; because that must re- "main to be decided after argument on the merits "of the case. But we hold that the effect which "these procedings have there, by the law and usage "of that state, was a question necessarily decided "by the New York courts, and that it was decided "against the claim set up by plaintiff in error un- "der the constitutional provision and statute re- "ferred to, and that the case is therefore properly "here for review."

In the same case, after hearing upon the merits, Mr. Justice Davis in delivering the opinion of the court, 7 Wall., stated:

"The question raised on the motion to dismiss "was, whether the supreme court of New York, in "this case, had decided against a right which "Green claimed under the Constitution and an act "of congress. If it had, then this court had juris- "diction to entertain the writ of error, otherwise "not.

"It was insisted on the one side, and denied on "the other, that the faith and credit which the "judicial proceedings in the courts of the State of "Illinois had by law and usage in that state, were "denied to them by the supreme court of New York, "in the decision which was rendered.

"Whether this was so or not, could only be prop- "erly considered when the case came to be heard

"on its merits; but this court, in denial of the "motion to dismiss, held that the supreme court of "New York necessarily decided what effect the at- "tachment proceedings in Illinois had by the law "and usage in that state; and as it decided against "the effect which Green claimed for them, this "court had jurisdiction, under the clause of the "Constitution which declares 'that full faith and " 'credit shall be given in each state to the public " 'acts, records and judicial proceedings in every " 'other state,' and the act of congress of 1790, "which gives to those proceedings the same faith "and credit in other states, that they have in the "state in which they were rendered.

"This decision, supported as it was by reason "and authority, left for consideration, on the hear- "ing of the case, the inquiry, whether the supreme "court of New York did give to the attachment "proceedings in Illinois, the same effect they would "have recived in the courts of that state."

The facts in the case of Crapo v. Kelly were as follows: A. of Massachusetts, owning a ship then on the high seas bound for the port of New York, but registered in Massachusetts, applied to the insolvent court of Massachusetts for the benefit of the insolvent laws o fthe state, and under the statutes of the state the judge of the insolvent court executed and delivered to the assignee an assignment of all the debtor's property, the effect of which, under the statute, was to convey to the assignee all the debtor's property "which he could have lawfully sold, assigned, or conveyed." The debtor himself executed no transfers. After this, the ship being still on the high seas, B., of New York, sued A. in New York for a money debt, and in accordance with the laws of New York respecting non-resident debtors issued

an attachment against his property. The ship arrived in port a few days afterwards and was attached by the sheriff at B's suit. On a suit in New York betwen the assignee in insolvency appointed by the Massachusetts court and the sheriff of New York, to determine with whom was the prior right, whether the Massachusetts assignee in insolvency or the New York attaching creditor, it was held by the highest court of New York that the prior right was with the New York attaching creditor. The case was brought to this court on a writ of error to the Supreme Court of New York, and this court held upon the question of its jurisdiction to review the decision of the New York court, that the New York court necessarily decided what effect the insolvent proceedings in Massachusetts had by law and usage in that state, and that as it decided against the effect which the defendant set up for them, this court had jurisdiction to review the judgment of the New York court. Mr. W. M. Evarts appeared in support of the motion to dismiss the writ of error. Mr. Justice Hunt delivered the opinion of the court and after stating as a precedent the facts and decision of the court in the case of Green v. Van Buskirk, stated as follows:

"Without reference to whether he was right or "wrong, the fact that Green claimed under the "judicial record of Illinois, and that his claim was "overruled, was held to give this court jurisdiction. "Without reference to whether Crapo was right or "wrong, whether the question was res integra, or "res adjudicata, the fact that he claimed title un- "der the Massachusetts record, and that his claim "was overruled, gives the court jurisdiction of the

"present case. The authority of Green v. Van Bus-
"kirk in 5th Wallace, is clear to that point. * * *

"Whether the Supreme Court of New York held
"correctly or otherwise was important when the
"case came before this court for a final hearing,
"but the fact simply that it had decided against
"Green's claim of the effect of the record gave juris-
"diction.

"We think the jurisdiction of the court now to
"hear and decide the case is sufficiently clear."

In the case of Hancock National Bank v. Farnum, decided March 12th, ultimo., the plaintiff claimed, in the courts of Rhode Island under a judgment recovered in the State of Kansas. This court by Mr. Justice Brewer in that case, stated as follows:

"The plaintiff's contention that these Federal
"provisions require a decision different from that
"made by the state court was distinctly presented
"and ruled against. The jurisdiction, therefore, of
"this court, is clear It may examine and inquire
"whether any right secured by these provisions
"was denied by the state court."

The case of Crapo v. Kelly, is cited in that opinion. The public acts of a state are by Section 1 of Article IV. of the Constitution, and by Sections 905 of the Revised Statutes, of the United States, placed in the same class with the records and judicial procedings of a state, and when it comes to the jurisdiction of this court to review a decision of the state court, the rule in that connection with reference to the public acts of a state must be the same as the rule in relation to its records and judicial proceedings, that is, the same as the rule stated

in Crapo v. Kelly and the other cases just cited. Accordingly, we conclude under the authority of those cases, that without reference to whether Louisa Banholzer, the plaintiff in error, was right or wrong in her contention, the mere fact that she claimed a right or immunity under a public act of the state of New York, and that her claim was overruled, gives this court jurisdiction of the case.

It was not necessary for plaintiff to make any specific reference to the Constitution or Statutes of the United States, since she set up in her complaint the public act of New York and this was equivalent to the assertion of a right under a statute of the United States.

Du Passeur v. Rochereau, 21 Wall. 134.

Ry. Co. v. Trust Co., 172 U. S. 493-509.

Crescent Co. v. Butchers' Union, 120 U. S. 144-146.

Hancock National Bank v. Farnum, supra.

In the last cited case, Mr. Justice Brewer who delivered the opinion of the court, quoted the following from Crescent Co. v. Butchers' Union:

"It may be conceded, then, that the judgments "and decrees of the circuit court of the United "States, sitting in a particular state, in the courts "of that state, are to be accorded such effect, and "such effect only, as would be accorded in similar "circumstances to the judgments and decrees of a "state tribunal of equal authority."

V.

BUT PLAINTIFF WENT FARTHER THAN WAS NECESSARY, ACCORDING TO THE RULE STATED IN GREEN V. VAN BUSKIRK, AND CRAPO V. KELLY, WHEN SHE SPECIFICALLY CLAIMED IN THE LOWER COURT A "RIGHT, TITLE, PRIVILEGE OR IMMUNITY" UNDER THE CONSTITUTION OF THE UNITED STATES, AND IF THIS HAD BEEN NECESSARY IT WAS DONE IN DUE TIME.

Printed record, folios 12, 13.

Loeber v. Schroeder, 149 U. S. 580.

Capital Bank v. National Bank, 172 U. S. 426.

On her appeal to the Supreme Court of Minnesota from the judgment of the district court of the County of Ramsey, plaintiff specifically assigned as error, that the judgment and holdings of said district court denied the provisions of the public act of New York, set out in her complaint, the full faith and credit secured to them and claimed for them by her by virtue of Section 1 of Article IV. of the Constitution of the United States. The Supreme Court of Minnesota, one Justice dissenting, upon the appeal, affirmed the judgment of the district court, and decided against the "title, right, privilege or immunity specially set up and claimed" by plaintiff under the Constitution of the United States.

All that the provisions of Section 709 of the Revised Statutes of the United States require to make a judgment of a state court reviewable here, is that

the "title, right, privilegé or immunity" should be "specially set up or claimed" *"before final judgment or decree in the highest court of a state,"* and that the decision should be against the "title, right, privilege or immunity so specially set up or claimed." In this case the public act of New York was set out in the complaint, and plaintiff claimed its effect to be such as to relieve her from a forfeiture of the policy The district court necessarily decided what effect was to be given to that public act. On appeal to the Supreme Court of Minnesota from the judgment of the district court, plaintiff specifically assigned as error that the district court in its holdings and judment denied to the public act of New York that full faith and credit secured to it by the Constitution of the United States. The right was thus specially set up or claimed more specially than was considered necessary in Green v. Van Buskirk and Crapo v. Kelly, and this was done prior to judgment in the highest court of the state, which is all the statute requires in any case.

In the case of Capital Bank v. National Bank, the general rule that a right under a statute of the United States is claimed in time when claimed before judgment in the highest court in the state is clearly enunciated in the following language of the opinion:

"The general rule was not questioned that if the "alleged right was not claimed before judgment in "the highest court of the state it could not be as-"serted in this court."

Our conclusion then is: First. That this was

a case for the application by the lower court of the public act of the State of New York and not for its construction, since its provisions are unambiguous, clear and precise to the effect that before an insurance company can declare a policy forfeited or lapsed by reason of the non-payment, when due, of any premium or any installment or portion of a premium required by the policy to be paid, it must give the notice therein prescribed within the time therein directed. Second. That such public act and the effect of its provisions relating to notice were duly proved in the lower court as matters of fact. Third. That the mere fact that the plaintiff claimed under a public act of the State of New York gives this court jurisdiction without reference to whether she was right or wrong in her contention. Fourth. That in the case at bar plaintiff went further than was necessary to establish the jurisdiction of this court when she specifically claimed before final judgment in the lower court a right, title, privilege or immunity under Section 1 of Article IV. of the Constitution and Section 905 of the Revised Statutes of the United States. Fifth. The jurisdiction of the court is clear.

Respectfully submitted,

CHRISTOPHER DILLON O'BRIEN,

Plaintiff's Attorney.

Dated April 17th, 1900.

1

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

Term No. 277.

LOUISA BANHOLZER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM.

To Christopher Dillon O'Brien, Esq., Counsel for Plaintiff in Error, St. Paul, Minn.

Sir:—You will please take notice that the defendant in error above named will upon Monday, the 30th day of April, 1900, at the opening of the Supreme Court of the

2 United States on said day, or as soon thereafter as counsel can be heard (or at the hearing of the above entitled cause if a hearing upon the merits thereof shall be sooner called by said Supreme Court), move the said Supreme Court at the court room of said Court in the Capitol in the City of Washington, D. C., to dismiss the writ of error to the Supreme Court of the State of Minnesota heretofore and on the 11th day of April, 1899, sued out of said Supreme Court of the United States by said plaintiff in error, and for such other and further order or relief as to the Court may seem just.

Further take notice that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled, because:

This cause does not involve a Federal question; that is to say there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority
3 exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any State, on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor, has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Further take notice that at the same time and place, said defendant in error will move said Supreme Court of the United States to affirm the judgment heretofore entered in said
4 cause by said Supreme Court of the State of Minnesota, to review which said writ of error has been sued out as aforesaid, and for such other and further order or relief as to said Supreme Court of the United States may seem just.

Further take notice that said motion to affirm will be based upon the ground that although the record may show that said Supreme Court of the United States has jurisdiction, it is manifest that the question on which such jurisdiction depends is so frivolous as not to need further argument.

Further take notice that said motions will be made upon all the records, files and papers of said cause above entitled, on file in said Supreme Court of the United States, which will be referred to in support thereof.

St. Paul, April 3rd, 1900.

GEO. C. SQUIRES,
F. W. M. CUTCHEON,
Counsel for Defendant in Error.

5 SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Term No. 277.

LOUISA BANHOLZER, Plaintiff in Error,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

Motion to Dismiss Writ of Error or to Affirm.

Now comes the New York Life Insurance Company, defendant in error above named, through its undersigned counsel, and

moves the Court to dismiss the writ of error to the Supreme Court of Minnesota heretofore, to-wit, on the 11th day
6 of April, 1899, sued out in this cause, or in case said writ shall not be dismissed, to affirm the judgment heretofore entered in said cause by said Supreme Court of the State of Minnesota, and for such other and further order or relief as to the Court may seem just.

Specification of Grounds of Motion.

The motion to dismiss the writ of error, made above, is based upon the ground that this Court has no jurisdiction to review the judgment of the Supreme Court of Minnesota heretofore entered in this cause, because:

This cause does not involve a Federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into
7 question in this cause the validity of any statute of, or any authority exercised under, any State, on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

The motion to affirm, made above, is based upon the ground that although the record may show that this Court has jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

8 *Statement of Facts.*

The New York Life Insurance Company, defendant in error, on September 16, 1895, issued its policy of insurance on the life of William Banholzer for $20,000, payable to him in twenty years from that date, or in case of his prior death, to Louisa Banholzer, the plaintiff in error. Banholzer was to pay a premium of $1146 in advance and a like sum on September 16th of each year thereafter until twenty full years' premiums had been paid. (*Record p. 35.*)

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided."

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest

charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month. (*Record p. 37.*)

Banholzer paid the first premium, but when the second premium became due, and within the one month's grace which was allowed for its payment, Banholzer paid $286 in cash, and for the remainder gave his note, as follows:

"St. Paul, Minn., 9–16, 1896.

Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of five per cent. per annum.

This note is given in part payment of the premium due 9–16–96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself. (Signed) Willliam Banholzer." (*Record, p. 39.*)

At the same time with the making of the above note, and as a part of the same transaction, the Insurance Company gave Banholzer a receipt as follows:

"St. Paul, Minn., 10–6–96.

Note six months, after date 9–16–96, due 3–16–97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, $286 in cash, and his note at six months for $860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by

J. A. Campbell, Cashier." (*Record, p. 39.*)

When this note matured on March 16, 1897, it was surrendered to Banholzer, who then paid $241.50 in cash, and made a new note for $639 with terms exactly similar to the first note, excepting that it was payable in sixty days from its date (*Record, p. 46*). This latter note was never paid.

On May 28, 1897, Banholzer was taken with a fever which continued from that time, with delirious intervals, until he died on July 5, 1897 (*Record, pp. 32, 33*).

On May 28, 1897, and about two hours after Banholzer had taken to his bed, he received a letter from the Insurance Company, as follows:

"New York Life Insurance Company, 346-348 Broadway.

Mr. Wm. Banholzer, New York, May 26, '97.
690 Stewart St., St. Paul, Minn.

Dear Sir:—We have received a report from our branch office returning unpaid the note which was given by you to meet the payment of the overdue premium on your policy No. 692,465.

We regret very much that you did not see your way to meet this note at its maturity, as we are certain that nothing short of an apparent necessity or some misapprehension of fact would compel you to give up your insurance with our company. You are no doubt aware that no other company issues policies which are more liberal in their conditions, or more satisfactory in their results, and we believe it would be very much against your own interests should you fail to do everything in your power to put this policy in force again.

Being a mutual company, we are anxious to do everything possible for the good of the policy holders, and if you will let us know just how much cash you can pay at present we shall take your case under consideration, and you can rest assured that, if it is at all possible to reinstate you on easy terms, we shall have the company do so. Any communication you make will be treated with the utmost confidence, and we will look for an early reply in the enclosed stamped envelope. Very truly yours,

Geo. W. Perkins,
3rd Vice President." (*Record, pp. 33, 39.*)

On June, 18, 1897, Banholzer, through Woodruff, his
12 attorney, sent a draft for $690, being the amount of the note of March 16, 1897, with interest, to the home office of the Insurance Company. This draft was returned with the following letter:

"New York Life Insurance Company, 346-348 Broadway.

Mr. F. G. B. Woodruff,
88 Court Block, St. Paul, Minn.

Dear Sir:—We acknowledge receipt of your letter of the 18th inst. enclosing draft of the Second National Bank of St. Paul, Minn., for $690 on the Western National Bank of New York City, which draft you tender in settlement of the unpaid note of $639, and interest, which note was due May 16th, 1897, accepted in part settlement of the premium due Sept. 16th, 1896, on policy No. 692,465—Banholzer. As policy No. 692,465—Banholzer—stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number. Very respectfully,

Hugh S. Thompson,
Comptroller." (*Record, p. 40.*)

Banholzer's application for the policy, which was signed by him, provides that the contract of insurance should be
13 construed according to the laws of the State of New York. (*Record, p. 26*).

At the time of the execution of the policy, there was in force a statute of the State of New York, providing as follows:

"No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest or installment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly
14 appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." Laws 1892, c. 690, § 92. (*Record, pp. 47, 48.*)

The notice required by the New York statute was duly given by the Insurance Company more than fifteen and less than forty-five days prior to September 16, 1896, but no such notice was given within the corresponding period prior to the maturity of either of the notes, although the ordinary bank notice was given prior to the maturity of each of said notes. (*Record, p. 33.*)

The Insurance Company has never returned the note of March 16, 1897, but it did not appear on the trial that a return had ever been demanded or that the Insurance
15 Company had ever attempted to enforce it, or ever asserted any rights under it. The answer alleges that the Insurance Company retains it merely as evidence of the contract between the parties, and for its own protection (*Record, p. 18*).

Proofs of death were seasonably served upon the Insurance Company at its home office.

By stipulation of the parties, the printed record in the case of Conway v. Phœnix Mutual Life Insurance Co. (see *140 N. Y., p. 79*) together with the printed briefs of counsel in said Conway case, were made a part of the record in this case with the same force and effect as if they had been introduced and considered in evidence upon the trial, and it was further stipulated that they should be certified to this Court upon any writ of error which might be taken in the case. (*Record, pp. 113, 114.*)

At the close of plaintiff's testimony, the case was dis-
16 missed by the trial court, and thereupon a motion for a new trial was made and denied, and thereafter an appeal was taken to the Supreme Court of the State of Minnesota, which affirmed the decision of the trial court (*Record, pp. 48, 49 and 50*). Upon suggestion of plaintiff's counsel that the Supreme Court had not distinguished between the facts in the Conway case and those in the case at bar, a re-hearing was had in which the Supreme Court of Minnesota adhered to to its former decision. (*Record, pp. 50, 51 and 52*) (*See* 74 Minn. 387.)

Argument.

The only ground upon which the counsel for the plaintiff in error rests his claim for the jurisdiction of this Court, is under section 1, Article IV of the Constitution of the United States, which requires that "full faith and credit shall be given in each state to the public acts, records and judicial
17 proceedings of every other state;" and under Section 905 of the Revised Statutes, which provides that the records and judicial proceedings of any state or territory, authenticated in the manner specified in the section, "shall

have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from which they are taken." Therefore, the only question for this Court to determine upon this motion, is, whether the Minnesota courts have in the case at bar failed to give that full faith and credit to the public acts, records or judicial proceedings of another state, which is required by the section of the Constitution above quoted.

An examination of the record will show that the Minnesota court has not only given full faith and credit to the New York Statute, but has construed it in the same
18 manner as the court of last resort in the State of New York, and recognized its binding force and validity as applied to the contract of insurance involved in this cause.

The contention, in the Minnesota courts, of the counsel for the plaintiff in error, was that the notice required by the New York statute (which notice, it is conceded, was given in the case at bar, *Record, p. 33*), should not only have been given at the proper time prior to the due date of the second insurance premium, viz., September 16, 1896, but that the same notice should have been given prior to the maturity of each of the notes which were made by the insured; and that failure to give the statutory notice before the maturity of these notes prevented the operation of the express provision in the notes, "that all claims to further insurance, all benefits whatever which full payment in cash of said premium would have
19 secured, shall be immediately void and forfeited to the New York Life Insurance Co. if this note is not paid at maturity."

The trial court in passing upon the motion to dismiss the case at the close of plaintiff's testimony, says (*Record, p. 34*):

"The only question in my mind about which I have any doubt, is the question whether the New York statute is applicable to the note. The plaintiff contends, as I understand it, that the giving of the note, with the cash payment, was a payment of the premium for the year. Of course, if it was a payment of the premium, then the statute would not apply to the provisions of the note, because payment of, or failure to pay the note would not be a payment of or failure to pay the premium. However that may be, it seems to me that the statute was not designed to apply to such a case, in any event; and if I had any doubt, it seems to me it ought to be resolved by the decision of the court of appeals of the State of New York in the 140th New York reports." (Conway v. Insurance Co., 140 N. Y. 79.)

In the Supreme Court of the State of Minnesota,
20 where by stipulation the whole record, including the briefs, in the Conway case were made a part of the appeal record (*Record, p. 113*), the question of whether the notice required by the New York statute was necessary as to the notes of September 16, 1896, and March 16, 1897, was again considered, and the court decided this case after fully considering the statute, exactly as the New York court had done, in the following language:

"The next and last contention of the plaintiff is that the 'premium notice' required by the statute of New York applied to the note which fell due May 16, 1897, and that the policy could not become lapsed or forfeited for the non-payment of the note without the company's giving the prescribed notice of not less than fifteen nor more than forty-five days prior to the day when the note, by its terms, became payable, notwithstanding the fact that the defendant had already given such notice before the premium became payable the preceding September. Even if the question was *res nova*, I am clearly of the opinion that, upon the facts, this statutory provision has no application to this note. But as my brethren do not agree with me in this, it would be useless for me to
21 enter into any discussion of the reasons for my opinion. The parties mutually agreed that this should be deemed a New York contract and construed according to the laws of that State. The decisions of the highest court of that State as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties. In Conway v. Insurance Co., 140 N. Y., 79, upon a state of facts and under a statute which in our opinion are in no way distinguishable from those involved in the present case, the court of appeals held that the notice required by statute did not apply to the notes; that the company having served that notice before the premium became due, no further notice was required. Counsel for the plaintiff do not claim that the facts of the two cases are in any respect distinguishable, but they seek to draw a distinction between the language of the statute considered in the 'Conway case' and the statute applicable to the present case. The statute under consideration in the former was Laws of N. Y., 1876, ch. 341, as amended by Laws 1877, ch. 321; the statute applicable to the present case is Laws of N. Y., 1892, ch. 690, sec. 92. This last act appears to be a compilation and revision of all the insurance laws of the State, and sec. 92 but an embodiment (with certain amendments) into the act of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all effects the
22 question now under consideration.

"Even if the 'one month's grace' allowed by the policy for the payment of the premium was applicable to the notes (which I do not think is so), that fact would not aid the plaintiff, for the insured did not offer to pay the last note until thirty-three days after it matured." (Banholzer v. N. Y. Life Ins. Co., 74 Minn. 396.)

And again, upon re-argument of this case in the Supreme Court of Minnesota, the New York statute was further considered and construed, and the former decision of the court adhered to, the following language being used: (*Record, pp. 51, 52.*)

"But we are now equally well satisfied that in what the court said on the subject of notice in the last part of the opinion it intended to and did decide the question upon the assumption that the company was bound by the agent's acceptance of a time note for the premium. This is made quite clear to our minds from an examination of the record and briefs in the case, copies of which have been furnished us by counsel for the defendant.

"While this shows the view of the court of appeals upon the construction of the statute, the doubt in our minds is whether, under the circumstances, it is a decision of the question which is binding on us. See Carroll v. Carroll, 16 How. (U. S.), 275-286 and 287.

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra* the notice required by it was not applicable to the notes given by Banholzer for part of the September premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to; and while courts are usually liberal in protecting the assured against forfeitures, this is
23 always done in the interest of justice and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was

"The premiums on life insurance policies are always payable at stated periods specified in the policy once for all during its life. They are usually payable yearly, sometimes every six months, and occasionally quarter-yearly. It seems to us that it was these periodical due days, as fixed in the policy itself, which the legislature had in mind and to which the statute refers, and not to an extension of time for the payment of a particular premium after it has become due according to the terms of the policy. These extensions are usually and probably always granted at the instance and for the accommodation of the insured. They are always the result of a special and express agreement, which brings the whole matter presently to the mind of the insured. They are necessarily for a comparatively short time.

"They are therefore not within the mischief of the statute; at least not to any considerable extent. The language of the statute is not very apt, if it was designed to include them, and in practice it would often be impracticable, if not impossible, to apply its provisions to such temporary and special extensions. To do so would often produce some very unreasonable results. For
24 example, if the extension was for only fifteen days the insurer would have to give the insured notice of the date when the extension would expire on the very day it was granted. Every extension, although in terms only for one day or for five days, would in effect amount to an extension for at least fifteen days. It can make no difference in principle whether the extension was for two days or two months, or whether a time note was taken for the overdue premium or the extension granted in some other way. For these reasons, the opinion heretofore filed is adhered to."

How can it be said, therefore, that the full faith and credit which must be given to the statutes and judicial proceedings of another State has not been fully complied with in the case at bar? There was no questioning by the Minnesota court of the validity or binding force of the New York statute; there was no dissent as to the proper application of it by the court of appeals of New York. On the contrary, the New York statute had full faith and credit given to it, and the construction placed upon it by the Minnesota court was in exact accordance with the decision of the New York court, both upon the strength of that decision and upon the independent reasoning of the Supreme Court of Minnesota.

This is no new question here, and it has been
25 long the decision of this Court that "the mere construction by the highest court of a state of a statute of another state, without questioning its validity, does not deny to it the full faith and credit which the Constitution and laws of the United States demand, in order to give this Court jurisdiction on writ of error. This is especially true when there are no decisions of the highest court of the latter state in conflict with the construction made by the court of the former state." (Glenn v. Garth, 147 U. S. 360, and cases cited.) In deciding that case, the Chief Justice says (*pp. 368-9*):

"If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concludedthat the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes invoked, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

See also Lloyd v. Matthews, 155 U. S. 222.

26 This being the rule, and necessarily the rule, of this court, argument seems futile upon so plain a proposition as is presented by this motion. There has been perfect compliance by the courts of Minnesota with the provision of the Constitution and entire accord with the decision of the court of last resort in the sister state; and therefore there is nothing in the case at bar which this court can review, or which gives this court any jurisdiction.

We submit, therefore, that the writ of error should be dismissed with costs.

GEO. C. SQUIRES,
F. W. M. CUTCHEON,
Counsel for Defendant in Error.

No. 277.

FILED
APR 23 1900
JAMES H. McKENNEY,
Clerk.

Brief of Squires & Cutcheon for D

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 277.

Filed April 23, 1900.

LOUISA BANHOLZER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief for Defendant in Error.

GEO. C. SQUIRES,
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vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief for Defendant in Error.

Statement of Facts.

The New York Life Insurance Company, defendant in error, on September 16, 1895, issued its policy of insurance on the life of William Banholzer for $20,000, payable to him in twenty years from that date, or in case of his prior death, to Louisa Banholzer, the plaintiff in error. Banholzer was to pay a premium of $1146 in advance and a like sum on September 16th of each year thereafter until twenty full years' premiums had been paid. (*Record p. 35.*)

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided."

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month." (*Record p. 37.*)

Banholzer paid the first premium, but when the second premium became due, and within the one month's grace which was allowed for its payment, Banholzer paid $286 in cash, and for the remainder gave his note, as follows:

"St. Paul, Minn., 9–16, 1896.

Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of five per cent. per annum.

This note is given in part payment of the premium due 9–16–96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself. (Signed) Willliam Banholzer." (*Record, p. 39.*)

At the same time with the making of the above note, and as a part of the same transaction, the Insurance Company gave Banholzer a receipt as follows:

"St. Paul, Minn., 10–6–96.

Note six months, after date 9–16–96, due 3–16–97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, $286 in cash, and his note at six months for $860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by

J. A. Campbell, Cashier." (*Record, p. 39.*)

When this note matured on March 16, 1897, it was surrendered to Banholzer, who then paid $241.50 in cash, and made a new note for $639 with terms exactly similar to the first note, excepting that it was payable in sixty days from its date (*Record, p. 46*). This latter note was never paid.

On May 28, 1897, Banholzer was taken with a fever which continued from that time, with delirious intervals, until he died on July 5, 1897 (*Record, pp. 32, 33*).

On May 28, 1897, and about two hours after Banholzer had taken to his bed, he received a letter from the Insurance Company, as follows:

"New York Life Insurance Company, 346-348 Broadway.

Mr. Wm. Banholzer, New York, May 26, '97.
690 Stewart St., St. Paul, Minn.

Dear Sir:—We have received a report from our branch office returning unpaid the note which was given by you to meet the payment of the overdue premium on your policy No. 692,465.

We regret very much that you did not see your way to meet this note at its maturity, as we are certain that nothing short of an apparent necessity or some misapprehension of fact would compel you to give up your insurance with our company. You are no doubt aware that no other company issues policies which are more liberal in their conditions, or more satisfactory in their results, and we believe it would be very much against your own interests should you fail to do everything in your power to put this policy in force again.

Being a mutual company, we are anxious to do everything possible for the good of the policy holders, and if you will let us know just how much cash you can pay at present we shall take your case under consideration, and you can rest assured that, if it is at all possible to reinstate you on easy terms, we shall have the company do so. Any communication you make will be treated with the utmost confidence, and we will look for an early reply in the enclosed stamped envelope.

Very truly yours,
Geo. W. Perkins,
3rd Vice President." (*Record, pp. 33, 39.*)

On June, 18, 1897, Banholzer, through Woodruff, his attorney, sent a draft for $690, being the amount of the note of March 16, 1897, with interest, to the home office of the Insurance Company. This draft was returned with the following letter:

"New York Life Insurance Company, 346-348 Broadway.

Mr. F. G. B. Woodruff,
88 Court Block, St. Paul, Minn.

Dear Sir:—We acknowledge receipt of your letter of the 18th inst. enclosing draft of the Second National Bank of St. Paul, Minn., for $690 on the Western National Bank of New York City, which draft you tender in settlement of the unpaid note of $639, and interest, which note was due May 16th, 1897, accepted in part settlement of the premium due Sept. 16th, 1896, on policy No. 692,465—Banholzer. As policy No. 692,465—Banholzer—stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number. Very respectfully,

Hugh S. Thompson,
Comptroller." (*Record, p. 40.*)

Banholzer's application for the policy, which was signed by him, provides that the contract of insurance should be construed according to the laws of the State of New York. (*Record, p. 26*).

At the time of the execution of the policy, there was in force a statute of the State of New York, providing as follows:

"No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest or installment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." Laws 1892, c. 690, § 92. (*Record, pp. 47, 48.*)

The notice required by the New York statute was duly given by the Insurance Company more than fifteen and less than forty-five days prior to September 16, 1896, but no such notice was given within the corresponding period prior to the maturity of either of the notes, although the ordinary bank notice was given prior to the maturity of each of said notes. (*Record, p. 33.*)

The Insurance Company has never returned the note of March 16, 1897, but it did not appear on the trial that a

return had ever been demanded or that the Insurance Company had ever attempted to enforce it, or ever asserted any rights under it. The answer alleges that the Insurance Company retains it merely as evidence of the contract between the parties, and for its own protection (*Record, p. 18*).

Proofs of death were seasonably served upon the Insurance Company at its home office.

By stipulation of the parties, the printed record in the case of Conway v. Phœnix Mutual Life Insurance Co. (see *140 N. Y., p. 79*) together with the printed briefs of counsel in said Conway case, were made a part of the record in this case with the same force and effect as if they had been introduced and considered in evidence upon the trial, and it was further stipulated that they should be certified to this Court upon any writ of error which might be taken in the case. (*Record, pp. 113, 114.*)

At the close of plaintiff's testimony, the case was dismissed by the trial court, and thereupon a motion for a new trial was made and denied, and thereafter an appeal was taken to the Supreme Court of the State of Minnesota, which affirmed the decision of the trial court (*Record, pp. 48, 49 and 50*). Upon suggestion of plaintiff's counsel that the Supreme Court had not distinguished between the facts in the Conway case and those in the case at bar, a re-hearing was had in which the Supreme Court of Minnesota adhered to its former decision. (*Record, pp. 50, 51 and 52.*) (*See* 74 Minn. 387.)

General Propositions.

(1) This Court has no jurisdiction to review the judgment of the Supreme Court of Minnesota in this cause.

(2) The statute of the State of New York requiring a certain notice to be given by the insurer to the insured prior to the maturity of a premium had no application to the promissory notes given by the insured in this cause, but the terms of the notes themselves governed and defined the rights of the parties.

Argument.

I.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA IN THIS CAUSE.

In order that this court should possess jurisdiction to review the judgment herein it must appear that the Supreme Court of Minnesota has failed to give that full faith and credit to the public acts, records and judicial proceedings of the State of New York which the Constitution requires.

We assert with the utmost confidence that such full faith and credit has been given by the Minnesota Court not only to the New York public act involved herein but to the records and judicial proceedings of that State. We have already discussed this question in our brief upon the formal motion to dismiss, and do not understand it is necessary to reprint that argument here, but assume that the Court will examine that brief should the hearing on the merits be first reached.

The situation here is fully covered by the decision of this court in *Glenn v. Garth, 147 U. S. 360,* where the Chief Justice says (*pp. 368-9*): "If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes invoked, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

See also Lloyd v. Matthews, 155 U. S. 222.

II.

THE STATUTE OF THE STATE OF NEW YORK REQUIRING A CERTAIN NOTICE TO BE GIVEN BY THE INSURER TO THE INSURED PRIOR TO THE MATURITY OF A PREMIUM HAD NO APPLICATION TO THE PROMISSORY NOTES GIVEN BY THE INSURED IN THIS CAUSE, BUT THE TERMS OF THE NOTES THEMSELVES GOVERNED AND DEFINED THE RIGHTS OF THE PARTIES.

In the Supreme Court of Minnesota the counsel for plaintiff-in-error not only argued the converse of the above proposition, but insisted that there had been a waiver of the forfeiture by the Insurance Company. This latter position is abandoned here however, as the assignments of error are all based on the alleged failure of the Minnesota Court to give full faith and credit to the New York statute and decisions, and the brief of the plaintiff-in-error does not allude to the question of waiver in any manner.

The one question, therefore, for this Court to pass upon (if it is decided that this cause is within its jurisdiction) is the applicability of the New York statute to the promissory notes given by the insured.

The policy requires the payment of the premium on September 16th in each year, with thirty days grace, and provides "If any premium is not paid on or before the day when due, this policy shall become void" (*Record, p. 22, fol. 46*). Therefore, it being conceded that the statutory notice had been properly given, if the insured had not paid the premium which fell due

September 16, 1896, within thirty days after that date, the policy would have become absolutely void.

See: *Joyce on Insurance, §§1103-1106 and cases cited, note 78.*
Fowler v. Insurance Co., 116 N. Y. 389.
Catoir v. Ins. & Trust Co., 33 N. J. L. 487.
Ashbrook v. Insurance Co., 94 Mo. 72.
Insurance Co. v. Ross, 159 Ill. 476, pp. 487-8.

The New York statute (*Laws 1892 c. 690, §92*) invoked by plaintiff-in-error, provides that no policy shall "be forfeited or lapsed by reason of non-payment when due of *any premium*, interest or installment or of any portion thereof *required by the terms of the policy to be paid*, unless a written or printed notice stating the amount of *such premium*, interest or installment or portion thereof *due on such policy*, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy." (*Record, pp. 11 and 12.*)

As before stated, it is conceded that this statutory notice was seasonably given as to the premium falling due September 16, 1896 (*Record, p. 33*). Was it necessary to give a like notice prior to the maturity of the notes?

The statute, as it will be seen, only refers to *premiums* required by the terms of the policy to be paid, but the counsel for the plaintiff-in-error contends that the use of the words "interest or installment or portion thereof" of such premium makes it applicable to the notes, because, he argues, the notes are mere evidence of an unpaid portion of the premium. This is not only straining the language of the statute beyond any proper construction, but is in direct conflict with the terms of the receipt given by the Company, which provides that "said policy is in force until the 16th day of September, 1897," (which was the due date of the next annual premium), "*provided the above note is paid at maturity,*" (*Record, p. 46*). It is therefore plain that the cash payment and the giving of the first note was a conditional payment of the premium due September 16, 1896, and continued the policy in force for another year, but the life of the policy depended upon the carrying out of the new contract which was then entered into; and the rights of the parties thereafter rested upon the observance by both of them of the terms of this new contract. What was the new contract which the insured and the insurer entered into, the consideration for which was the extension of the time for payment of a part of the amount which the insured should have paid within thirty days after September 16, 1896? It is plain and unequivocal. It consists of a promissory note made and signed by the insured, which reads as follows:

"Pol. 692,465. St. Paul, Minn., 9-16-1896.

Without grace six months after date I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second

National Bank, St. Paul, Minn., value received, with interest at the rate of 5 per cent. per annum.

This note is given in part payment of the premium due 9-16-'96 on the above policy with the understanding that all claims as to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

No. 43205. Int. 21.50. $860. William Banholzer."
March 16, '97.

and a cotemporaneous receipt signed by the Company's cashier, reading as follows:

"New York Life Insurance Company, 346-348 Broadway, New York.
Cash, $286.
St. Paul, Minn., 10-6-'96.

Note 6 mos., dated 9-16-'96, due 3-16-'97 without grace.
Made by Wm. Banholzer.
Payable at Second National Bank, St. Paul, Minn

Received from the owner of policy No. 692,465, $286 in cash and his note at six months for $860, which continues said policy in force until the 16th day of Sept., 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by

J. A. Campbell, Cashier."

The insured knew then that unless he paid his note in six months after this date, according to its terms, "*all claims as to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall immediately become void and be forfeited to the New York Life Insurance Company * * * except as otherwise provided in the policy itself.*" (This exception refers to the non-forfeitable provisions of the policy which in this case had not taken effect. *Record p. 23, fol. 48.*)

The note given on March 16, 1897, (which was never paid) in renewal of a part of the note above quoted, was exactly similar in terms, excepting that it was payable in two months (*Record, p. 16*).

A careful consideration of the language of the statute shows that it can have no reference whatever to notes which may be given subsequent to the maturity of the premium, by which the insured is allowed some favor as to the time or the manner in which his indebtednes to the insurer shall be paid. The express language of the statute precludes any such construction. The notice to be given must state "*the amount of such premium*, interest or installment or portion thereof *due on such policy*," and it is to be addressed and mailed to *the person whose life is insured, or the assignee of the policy*. Suppose the note which the insurer had taken in settlement of the premium had been the note of some one other than the insured, but containing the same clause as to forfeiture of the policy if it were not paid at maturity. Could it be argued that the insured would have to give the statutory notice prior to the maturity of the note to the maker thereof who might not be the insured and

who might not communicate the fact that he had received such notice to the insured? Or to suppose a more extreme case, which we suggested to the Minnesota Court and which is embodied in its opinion, where the policy allowed no grace, and the insured asked for an extension of only ten days for the payment of his premium, and gave his note with conditions similar to those in the notes in question, would it be argued that the insurer was obliged to give the statutory notice of at least fifteen days five days prior to the date of the making of the note, and at a time when the insurer did not know that any such note would be made? This and other supposable cases show conclusively that it was not the intention of the framers of the statute that the notice required should be given in the case of a promissory note, but only as to premiums falling due.

The use of the words "interest or installment, or portion thereof," is intended evidently to cover the very common case by which, although the policy requires the payment of an annual premium, an arrangement is subsequently made by which this annual premium is divided into quarterly or semi-annual installments.

See *DeFrece v. Ins. Co., 136 N. Y. 144.*

The reason for requiring this statutory notice as to premiums has no existence in the case of promissory notes. In many insurance policies, the amount to be paid upon a premium day is not ascertainable by reference to the policy, as it may be varied by dividends earned, or by other causes. The amount is always fixed and known in the case of a note. The place at which a premium is to be paid is often changed, and the person or officer to whom it is payable, and the statute properly requires that the notice shall state where it is to be paid, and the person to whom it is to be paid. In the case of a note, these uncertainties cannot occur. Then too, the insurance policy usually runs for so long a time that the insured may forget the exact day upon which the premium falls due, and hence he is protected by the statutory notice. In the case of a note, which is invariably for a short period, no such considerations apply; and as notes are usually payable at a bank, the custom of banks to give notice of the maturity of notes (as was done here) constitutes a sufficient protection to the maker.

All these reasons for the non-applicability of the statutory notice to the notes given by the insured were carefully considered by the Supereme Court of Minnesota, and in rendering its decision upon the re-argument of the case, the following language was used (Mitchell, J.):

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra*, the notice required by it was not applicable to the notes given by Banholzer for part of the September

premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to; and while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was not within the legislative intent.

"The premiums on life insurance policies are always payable at stated periods specified in the policy once for all during its life. They are usually payable yearly, sometimes every six months, and occasionally quarter-yearly. It seems to us that it was these periodical due days, as fixed by the policy itself, which the legislature had in mind and to which the statute refers, and not to an extension of time for the payment of a particular premium after it has become due according to the terms of the policy. These extensions are usually and probably always granted at the instance and for the accommodation of the insured. They are always the result of a special and express agreement, which brings the whole matter presently to the mind of the insured. They are necessarily for a for a comparatively short time.

"They are not therefore within the mischief of this statute; at least, not to any considerable extent. The language of the statute is not very apt, if it was designed to include them, and in practice it would often be impracticable, if not impossible, to apply its provisions to such temporary and special extensions. To do so would often produce some very unreasonable results. For example, if the extension was for only fifteen days the insurer would have to give the insured notice of the date when the extension would expire on the very day it was granted. Every extension, although in terms only for one day or for five days, would in effect amount to an extension for at least fifteen days. It can make no difference in principle whether the extension was for two days or two months, or whether a time note was taken for the overdue premium or the extension granted in some other way. For these reasons, the opinion heretofore filed is adhered to." (*Record, pp. 51, 52.*)

But independent of the conclusions of the Supreme Court of Minnesota we have a decision of the Court of Appeals of New York, passing on its own statute, which is exactly in point, and which we submit is binding upon this court.

See *Conway v. Insurance Co., 140 N. Y. 79.*

The Conway case was an action upon a policy of insurance issued by the Phœnix Mutual Life Insurance Company upon the life of William F. Conway, the plaintiffs' intestate. The policy was payable to his legal representatives upon his death, or at the end of twenty years to him if then living. By its terms, if default should occur in the payment of any premium, after three or more years' premiums should have been paid upon it, the Company was to become liable for a sum of paid-up insurance, to be paid at the death of the insured or at the due date of the policy, equal to as many twentieths of the amount of the policy as there should have been paid full years' premiums thereon. The policy also contained a provision "that if any subsequent premium hereon be not paid when due, and a separate receipt signed by the president or secretary of this company, in each case given therefor, then this policy shall cease." It also contained a declaration that "no agent or other person can alter, modify or waive any of the terms or conditions of this policy." (*Record, pp. 59, 60.*) Four full

years premiums upon his policy were paid by the insured and in each case he received a renewal receipt which contained a notice that "no agent is authorized in any case to waive or postpone payment of premium or to accept it after the date at which it falls due without special permission from the president or secretary of the company." (*Record, p. 69.*) When the fifth year's premium fell due, October 24th, 1891, the insured failed to pay it, but gave to the general agents of the company a note for its amount, due in six months—this was a plain promissory note without any forfeiture clause attached (*Record, p. 69*)—which they accepted, witholding the renewal receipt. The renewal receipt (which was prepared at the company's home office, sent to the general agents, and was by them, in case of default, to be returned to the home office at such time thereafter as they were notified so to do) was held by the agents in their own hands until after the death of the insured. During all this time the company did not demand the return of the receipt. In the meantime it had ample opportunity by means of the monthly reports of its agents to inform itself of the fact that the premium had not been paid. A few days prior to the maturity of his note, the insured wrote the company's agent, stating his inability to pay it, when due, and asking its renewal for three months. To this letter the agents, who had already placed the note in bank for collection, replied (April 19, 1892,) that *they did not feel at liberty to accept a note extending the time of payment of insured's renewal any further*, but that they would recall the note from the bank *and hold the "renewal"* (receipt) *at their office as long as possible; that they might be required any day to return it to the home office for cancellation.* (*Record, p. 66.*) The note was recalled from the bank and held by the agent until after the death of the insured, no payment of, or upon, it having been made. It was customary for the agents to accept payment of premiums after due and the company had knowledge of, and had at least impliedly authorized, this custom. More than thirty and less than sixty days prior to the due date of the premium, *i. e.*, on August 31st, 1891, the company gave to the insured the premium notice required by the N. Y. statute. No other notice was ever given. The plaintiff sought to recover the full amount of the policy less the amount of the note with interest. The defendant offered judgment for $1,000 being $\frac{1}{20}$ of the amount of the policy. In her complaint, the plaintiff, the administratrix of the insured, set out, among other things, that "*the defendant never served the notice required by the statute, within the time required by the statute, that said policy would lapse or be forfeited in case of the failure of the assured to pay the premium due by the terms of the note, April 27th, 1892*" (*Record, p. 58*). This allegation was admitted by the

answer, although the answer set out the notice given August 31, 1891, and defendant, upon trial, proved that this last mentioned notice had been duly given. The trial court directed a verdict for the amount claimed and judgment having been entered upon the verdict, it was affirmed at the general term.

Upon appeal the company claimed, (1) that forfeiture resulted immediately upon the failure of the insured to pay his premium upon its due date; and (2) if the acceptance of his note amounted to an extension, forfeiture resulted immediately upon default in payment of the note, April 27, 1892. (*Record, pp. 99, 101.*) Its counsel argued that the company's agents had no authority to extend the time for the payment of a premium; that the company itself had no knowledge of the granting of any extension; that if the acceptance of the note amounted to an extension, the agent had no authority to extend the time for the payment of the note and that they had in fact refused even to attempt to grant any extension of the time for its payment.

Plaintiff's counsel claimed (1) that the acceptance of the note constituted an extension of the time for the payment of the premiums; (2) That the letter written by the agents to the insured constituted an extension of the time for payment of the note until some date after notice to pay; and (3) that *no forfeiture could occur unless the premium notice required by statute was given in anticipation of, or subsequent to, the maturity of the note.*

Counsel for appellant (the company) in this Conway case, preparing their brief, of course, in ignorance of exactly what the brief of respondent would contain, anticipated that some claim would be made by respondent's counsel that the provisions of the statute with reference to premium notices had not been complied with, and devoted more than two pages of their brief to showing that the defendant had fully complied with the statute and concluded their argument upon this phase of the case with these words: "The notice required having been given, the effect of non-payment is precisely the same as it would have been before the statute, and the question as to waiver or forfeiture is governed by establishing principles, irrespective of the statute." (*Record, pp. 97-99.*)

When plaintiff's brief was filed, the contention of counsel in this respect became plain. Subdivision V reads as follows: (After arguing that the agents had authority to extend the time for payment of the note) "*Moreover, accepting the note extended the time of payment of the premium, so that the premium did not become due until the note matured, which was six months from October. This made the notice served by company August 31, 1891, of no avail. The premium became due when the note matured, and the company failed to serve*

any notice either before or after the note matured, within the time required by statute. Laws of 1877, Chap. 321. (Record, p. 110.)

Plaintiff's counsel did not at any time claim that if forfeiture had occurred by reason of non-payment of the premium upon the premium day, any notice other than that actually given was necessary.

In deciding the case, New York Court of Appeals discusses the questions involved with reference to the argument of plaintiff's counsel. It first takes up the question of the authority possessed by the general agents of the Company, and negativing the contention of the plaintiff that their power was less subject to limitation than that of ordinary agents, holds that their authority was primarily limited by the very strict terms of the policy; that the insured was chargeable with knowledge of the limitations so imposed; that his right to believe that these limitations had been removed, to any extent, was confined to such inferences as might reasonably be drawn from methods of business which had acquired the force of consent by reason of their public and continuous nature, or from some particular course of dealing in his own case. The court then discusses the evidence bearing upon the point of the agents authority, so far as it tends to establish a custom of business, declaring that there was no evidence in the case that the company ever knew that their agents had taken a note for a premium, but holding that the company had sanctioned the custom of the agents to accept payment of overdue premiums, limiting their authority so to do, however, to cases of policy-holders in good health. The court then expresses the opinion that the insured was entitled to the benefit of this general custom as so limited.

It then proceeds to state what, with reference to this point is "fairly inferable" from the evidence discussed. This is, in effect, that the agents were at liberty to accept payment of a premium tendered by the insured after the same became due, provided no alteration in his health had occurred in the meantime. The court excludes from its statement of what is "fairly inferable" the conclusion that the agents were at liberty to extend the time for payment to a date in the future. It then states *the effect* of an arrangement such as the agents were thus authorized to make, viz., that upon failure of the insured, after notice, to pay his premium upon its due date, the risk that pending the delay he might change in health or die, was upon him. (*140 N. Y. 85.*)

Then after discussing some other questions involved the Court is brought to the contention of the plaintiff that the acceptance of the note had nullified the effect of the original premium notice, and that a new premium notice subsequent to

the maturity of the note was required by the statute, and it disposes of that proposition as follows:

"No further notice was required from the company to the deceased. The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for non-payment of an annual premium, was not necessary, inasmuch as it had duly given the notice before the premium became due which the statute has provided for. The statute does not apply to this case. Chap. 341, Laws 1876, and Chap. 321, Laws 1877." (*140 N. Y. 86.*)

See also *Holly vs. Insurance Co., 105 N. Y. 437.*

We have carefully analyzed the Conway case because the counsel for the plaintiff-in-error insisted in the Minnesota Court, and makes the same contention here, that the New York Court of Appeals in deciding that case, did not decide that the statutory notice was not necessary in the case of a promissory note given in settlement of a premium. It seems to us that no fair construction of the points raised by the parties in the Conway case, and of the language of the Court in deciding it, can reach any other conclusion than that the exact point which is here for decision was fully considered and decided by that court.

What possible object could there have been in the use of the language, *"No further notice was required from the company to the deceased. The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for non-payment of an annual premium was not necessary, inasmuch as it had duly given the notice before the premium became due, which the statute has provided for. The statute does not apply to this case.* (*Chap. 341, Laws 1876, and Chap. 321, Laws 1877,*)" if it were not intended by that court to decide that the statutory notice had no application to a promissory note.

But counsel for plaintiff-in-error, in order to avoid the effect of the decision in the Conway case, raises the point that there is a distinction between the New York statute of 1877, which was passed upon in that case, and the statute of 1892 which affects the case at bar, and he sets out in parallel columns on page 13 of his brief, the two acts, in order to show this alleged distinction. We repeat them here:

1892.	1877.
Nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest or installment, or of any portion thereof required by the terms of the policy to be paid, unless, etc.	No life insurance company shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of any annual premium, or interest, or any portion thereof, except, etc.

It is a mere splitting of hairs to say that the statute of 1892 imposes upon the insurer any different obligations, and

particularly any new obligations, as to promissory notes, than the statute of 1877. And even the ingenious imagination of the counsel for the plaintiff in error does not in any reasonable sense suggest a difference.

This suggested difference was urged in the Supreme Court of Minnesota, and was disposed of by that Court as follows:

"*The statute under consideration in the former was Laws (N. Y.) 1876, c. 341, as amended by Laws 1877, c. 321; the statute applicable to the present case is Laws (N. Y.) 1892, c. 690, § 92. This last act appears to be a compilation and revision of all the insurance laws of the state, and section 92 thereof is but an embodiment (with certain amendments) of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all affects the question now under consideration.*"

Banholzer v. N. Y. Life Ins. Co., 74 Minn., p. 397.

We insist, therefore, that even if this Court is of the opinion that it has jurisdiction of the case, the decision must be the same as that of the New York Court of Appeals in the Conway case, and as that of the Minnesota courts, both on the trial and upon the two hearings had before the Supreme Court of that state; and hence that the judgment of the Minnesota Court must be affirmed.

GEO. C. SQUIRES,
F. W. M. CUTCHEON,
Counsel for Defendant-in-Error.

BANHOLZER *v.* NEW YORK LIFE INSURANCE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 277. Argued and submitted April 27, 1900.—Decided May 28, 1900.

This case is dismissed for want of jurisdiction, as the Supreme Court of Minnesota did not deny the validity of the New York statute with regard to insurance, but only construed it, and even granting that its construction was erroneous, faith and credit were not denied to the statute.

THIS action was brought in the District Court of the Second Judicial District of the State of Minnesota upon a life insurance policy for $20,000, issued by defendant in error to William Banholzer, husband of the plaintiff in error, dated the 16th of September, 1895, payable upon the death of Banholzer to plaintiff in error, or to Banholzer himself on the 16th of September, 1915, if he should be living then.

The premiums were to be paid annually in advance on the 16th day of September of every year, until twenty full years' premiums should be paid.

The first premium was paid, which continued the policy in force until the 16th of September, 1896.

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided.

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of five per cent per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebedtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month."

Statement of the Case.

On the 6th day of October, 1896, Banholzer paid the defendant the sum of $286 in cash, and executed and delivered to the defendant the following note:

"ST. PAUL, MINN., 9–16, 1896.

"Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of five per cent per annum.

"This note is given in part payment of the premium due 9–16–'96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

(Signed) "WILLIAM BANHOLZER."

The following receipt was given for the note:

"ST. PAUL, MINN., 10–6–'96.

"Note six months, after date 9–16–'96, due 3–16–'97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, $286 in cash, and his note at six months for $860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt is signed by

"J. A. CAMPBELL, *Cashier.*"

The note matured March 16, 1897, when it was surrendered to Banholzer, and he paid to the defendant $241.50 in cash, and executed and delivered to the defendant a new note in terms exactly similar to the first note, except that it was payable in sixty days from date. This note was never paid.

On May 28, 1897, Banholzer was taken sick, and died on July 5, 1897.

On June 18, 1897, Banholzer, through his attorney, sent a

draft to the defendant for the sum of $690, being the amount due on the note of March 16 of that year, in tender of its payment. The defendant returned the draft, writing by its comptroller that "as policy No. 692,465 — Banholzer — stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number."

By the application for the policy the latter was to be construed according to the laws of New York. The statute which is claimed to be applicable is inserted in the margin.[1]

The notice required by the statute was duly given more than fifteen and less than forty-five days prior to September 16, 1896, but no notice was given prior to the maturity of the notes, except the ordinary bank notice.

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[1] No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or instalment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Laws 1892, c. 690, § 92.

The insurance company has not returned the note of March 16, 1897, and the record does not show that it has ever been demanded.

By stipulation of the parties, the printed record in *Conway* v. *Phenix Mutual Life Insurance Company*, 140 N. Y. 79, together with briefs of counsel, were made part of the record, as though they had been introduced in evidence, and it was also stipulated that they should be certified to this court.

At the close of the plaintiff's testimony the case was dismissed. Subsequently a motion for a new trial was made and denied, and an appeal was then taken to the Supreme Court of the State, which affirmed the decision of the trial court. A reargument was granted, and the court adhered to its opinion. 74 Minn. 387.

The case is here on writ of error, and defendant in error moves to dismiss for want of jurisdiction, or to affirm the judgment.

Mr. Christopher Dillon O'Brien for plaintiff in error submitted on his brief.

Mr. George C. Squiers for defendant in error. *Mr. F. W. M. Cutcheon* was on his brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The case is here on a single question. The counsel for plaintiff in error says:

"While originally other questions were raised by the plaintiff they were determined adversely to her and her case made to stand or fall solely upon the interpretation of the New York statute, and the question now before this court is, did the court below in the case at bar give to the statute such full faith and credit as is secured to it by the Constitution of the United States."

That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and

moves to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only construed it, and, even granting the construction was erroneous, faith and credit were not denied to the statute. *Glenn* v. *Garth*, 147 U. S. 360, and *Lloyd* v. *Matthews*, 155 U. S. 222, are cited.

Those cases sustain the distinction which defendant in error makes, and the deduction from it, and our inquiry will therefore be: Did the Supreme Court of the State of Minnesota deny the validity of the New York statute or only consider its operation and effect? The claim of the defendant in error is that each of the notes was an "instalment or portion of the premium," and that, therefore, the Supreme Court of Minnesota, in holding that the notice prescribed by section 92 was not necessary to be given prior to the maturity of the notes, denied full faith and credit to the statute.

We dispute the conclusion without passing on the premises. The ruling was a construction of the statute, not a denial of its validity, and that the court meant no more, and meant to follow, not oppose, the decisions of the State, is evident from its opinions.

The first opinion was put on the authority of *Conway* v. *Insurance Co.*, 140 N. Y. 79, on the assumption that its facts were not different from those of the case at bar. In the second opinion the construction of the New York statute was considered as *res integra*, and it was held that "the notice required by it was not applicable to the notes given by Banholzer for part of the September premium."

In the first opinion, the contention that the "premium notice" required by the statute applied to the note, which fell due March 16, 1897, and that the policy could not be forfeited without such notice, the learned justice who spoke for the court said:

"Even if the question was *res nova*, I am clearly of the opinion that, upon the facts, this statutory provision has no application to this note. But as my brethren do not agree with me in this, it would be useless for me to enter into any discussion of the reasons for my opinion. The parties mutually agreed

that this should be deemed a New York contract and construed according to the laws of that State. The decisions of the highest court of that State as to the construction of such a contract and of the statutes of New York must, therefore, be accepted as conclusive upon the parties. In *Conway* v. *Insurance Co.*, 140 N. Y. 79, upon a state of facts and under a statute which, in our opinion, are in no way distinguishable from those involved in the present case, the Court of Appeals held that the notice required by statute did not apply to the notes; that the company having served that notice before the premium became due, no further notice was required. Counsel for the plaintiff do not claim that the facts of the two cases are in any respect distinguishable, but they seek to draw a distinction between the language of the statute considered in the *Conway* case and the statute applicable to the present case. The statute under consideration in the former was Laws of N. Y., 1876, ch. 341, as amended by Laws, 1877, ch. 321; the statute applicable to the present case is Laws of N. Y., 1892, ch. 690, sec. 92. This last act appears to be a compilation and revision of all the insurance laws of the State, and section 92 but an embodiment (with certain amendments) of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all affects the question now under consideration.

"Even if 'the one month's grace' allowed by the policy for the payment of the premium was applicable to the notes, (which I do not think is,) that fact would not aid the plaintiff, for the insured did not offer to pay the last note until thirty-three days after it matured."

In the second opinion the court said that it had overlooked that counsel had claimed the case to be distinguishable on the facts from the *Conway* case; but on reëxamining the *Conway* case it further said that the question of notice might have been disposed of on the ground of want of power of the agent of the insurance company to accept a note—

"But we are now equally well satisfied that in what the court said on the subject of notice in the last part of the opinion it intended to and did decide the question upon the assumption

that the company was bound by the agent's acceptance of a time note for the premium. This is made quite clear to our minds from an examination of the record and briefs in the case, copies of which have been furnished us by counsel for the defendant.

"While this shows the views of the Court of Appeals upon the construction of the statute, the doubt in our minds is whether, under the circumstances, it is a decision of the question which is binding on us. See *Carroll* v. *Carroll*, 16 How. 275–286 and 287.

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra* the notice required by it was not applicable to the notes given by Banholzer for part of the September premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to. And while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice, and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was not within the legislative intent."

The plaintiff in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the *Conway* case, and erred in its independent construction of the New York statute.

Granting, *arguendo*, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared and its meaning was first sought in a decision of the New York courts, and then confirmed by an independent case and construction.

We think, therefore, that the cases of *Glenn* v. *Garth* and *Lloyd* v. *Matthews*, *supra*, apply, and on their authority the action should be

Dismissed for want of jurisdiction.